



State of California
Office of the Attorney General

Conflict of interest laws are grounded on the notion that government officials owe paramount loyalty to the public, and that personal or private financial considerations on the part of government officials should not be allowed to enter the decision making process. The purpose of this pamphlet is to assist government officials in complying with California's conflict of interest laws and to assist the public and the news media in understanding these laws so that conflict of interest situations can be monitored and avoided.

This pamphlet does not purport to cover all conflict of interest laws. Rather, it focuses on financial conflicts of interest by local and state executive and legislative officials. It does not cover judicial conflicts of interest, the Legislative Code of Ethics, nor the ethical requirements of the state bar.

If you suspect that a government official or a candidate may be involved in a conflict of interest, you can consult this pamphlet to familiarize yourself with the basic requirements of the law and of the enforcement remedies which are available to you. Although this pamphlet will be helpful to both officials and the public, it is no substitute for directly consulting the law in question, or a private or public attorney.

By providing information about the requirements of these laws, the ways in which they have been interpreted and the ways in which they can be enforced, we hope that fewer misunderstandings will result about what is and what is not a conflict of interest. Through an understanding of these laws, government officials should be able to avoid conflict-of-interest situations and members of the public will be better able to determine whether a conflict of interest exists.

Ideas and suggestions for future editions of this pamphlet are welcome and should be addressed to the editors.

Sincerely,

BILL LOCKYER
Attorney General

CONFLICTS OF INTEREST

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
Attorney General



Prepared by the Division of Civil Law

James M. Humes
Chief Assistant Attorney General

Louis R. Mauro
Senior Assistant Attorney General

Ted Prim, Editor
Deputy Attorney General
Robert E. Leidigh, Editor
Deputy Attorney General

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INTRODUCTION

In preparing this pamphlet, we relied on a variety of legal resources. Obviously, California statutes and appellate court cases were consulted and are cited throughout the pamphlet. While most of the more significant cases are discussed, this pamphlet is not intended to be a compendium of all court cases in this area. In addition, we referred to published opinions and letter opinions issued by this office. Published opinions are cited by volume, page number and year (e.g., 59 Ops.Cal.Atty.Gen. 339 (1979)). Indexed letters or letter opinions are cited by year and page number (e.g., Cal.Atty.Gen., Indexed Letter, No. IL 75-255 (July 21, 1975)). Published opinions are available through law libraries and some attorneys' offices. As a general rule, indexed letters are available only in the Offices of the Attorney General. Copies may be obtained by a request to the editor.

We also referred to the regulations, published opinions and informal advice letters of the Fair Political Practices Commission (hereinafter "FPPC"). The regulations are found in title 2 of the California Code of Regulations in section 18000 et seq. The opinions of the FPPC may be found in publications of Continuing Education of the Bar and are cited by name, year of publication, volume and page number (e.g., *In re Lucas* (2000) 14 FPPC Ops. 15). We occasionally make reference to FPPC informal advice letters which are referred to by name and number (e.g., *Best Advice Letter*, No. A-81-032). Copies of these materials may be obtained from the FPPC, or online through LEXIS-NEXIS or WESTLAW in the CAL-ETH database.

The pamphlet is current through January 1, 2004 with respect to statutes, case law, Attorney General opinions, and opinions and regulations of the FPPC.

If you have specific questions, you should consult an attorney, or in the case of questions concerning the Political Reform Act, the FPPC. In the case of questions concerning the Legislature, its employees or other persons who are subject to Government Code section 8920 et seq., you should contact the Legislative Ethics Committee for the house of the Legislature in question. If you have concerns about potential violations of a conflict-of-interest statute, you should first consult with a representative of the government agency, board or commission which may be affected by the conflict of interest. If you continue to think that a conflict-of-interest violation may exist, you may wish to contact the District Attorney for your county, or other enforcement authority described in the pertinent chapter of this pamphlet.

If you wish to obtain additional copies of this pamphlet, they may be ordered or downloaded via the Attorney General's Home Page, located on the World Wide Web at <http://caag.state.ca.us>. You may also write to the Attorney General's Office, Public Inquiry Unit, P.O. Box 944255, Sacramento, CA 94244-2550 or call us at (800) 952-5225 (for callers within California), or (916) 322-3360 (for callers outside of California); the TTY/TDD telephone numbers are (800) 952-5548 (for callers within California), or (916) 324-5564 (for callers outside of California).

Other relevant pamphlets available to the public produced by the Office of the Attorney General include:

The Brown Act (open meetings for local legislative bodies)
Quo Warranto

ISSUE SPOTTER CHECKLIST

LAW

Financial Conflict of Interest

Political Reform Act

Gov. Code, § 87100 et seq.

GUIDEPOSTS

Is a state or local official participating in a government decision?

Does the decision affect an interest in real property or an investment of \$2,000 or more held by the official? Or a source of income to the official of \$500 or more? Or gifts to the official of \$340 or more?

If so, is there a reasonable possibility that the decision will significantly affect any of the interests involved?

Are the official's interests affected differently than those of the general public or a significant segment of the public?

If the answer to these questions is yes, the official may have a conflict of interest and be required to disqualify himself or herself from all participation in that decision. (See ch. I.)

Financial Interests in Contracts

Gov. Code, § 1090 et seq.

Does a member of a board have a direct or indirect financial interest in a contract being made either by the board or by any agency under the board's jurisdiction?

If so, the member may be subject to criminal sanctions and the contract may be void and any private gain, received by the official under the contract, may have to be returned.

Has any other state or local officer or employee participated in the making of a contract in which the official had a direct or indirect financial interest?

If so, the official may be subject to criminal sanctions and the contract may be void and any private gain received by the official under the contract may have to be returned. (See ch. VI.)

Limitations on State Contracts
Pub. Contract Code, § 10410

Is a state official (other than a part-time board member) involved in an activity, employment or enterprise, some portion of which is funded by a state contract?

Is a state official, while employed by the state, contracting with a state agency to provide goods or services as an independent contractor?

If the answer to any of these questions is yes, a prohibited activity may have occurred. (See ch. VI., sec. B.)

Conflict of Interest Resulting from Campaign Contributions
Gov. Code, § 84308

Is there a proceeding involving a license, permit or entitlement for use?

Is the proceeding being conducted by a board or commission?

Were the board members appointed to office?

Has any board member received contributions of more than \$250 from the applicant or any other person who would be affected by the decision:

- during the proceeding?
- within the previous 12 months prior to the proceeding?
- within 3 months following a final decision in the proceeding?

If the answer to any of these questions is yes, the board member may have to disqualify himself or herself from participating in the decision. (See ch. III.)

Appearance of Financial Conflict of Interest
Common Law

Court-made law, based on avoiding actual impropriety or the appearance of impropriety in the conduct of government affairs, may require government officials to disqualify themselves from participating in decisions in which there is an appearance of a financial conflict of interest. (See ch. XII.)

Receipt of Direct Monetary Gain or Loss
Gov. Code, § 8920

Will an officer receive a direct monetary gain or loss as a result of official action?

If an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity, the officer should disqualify himself or herself from the decision.

However, a conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member. (See ch. XIII.)

Public Reporting of Financial Interests
Political Reform Act
Gov. Code, §§ 87200-87313

Is the official a state or local officer or employee who participates in the making of government decisions?

If so, the official may be required to file a public report disclosing investments, real property, income and gifts. (See ch. II.)

Incompatible Activities
Gov. Code, § 1125 et seq. (local officials);
Gov. Code, § 19990 (state officials)

Is an official using his or her government position or using government information or property in an improper manner?

Has the official's agency or appointing authority adopted an incompatible activities statement?

If the activity has been prohibited by an incompatible activities statement, the official can be ordered to stop the practice and may be disciplined. (See ch. IX regarding local officials, and ch. X regarding state officials.)

Incompatible Offices
Common Law

Does a single official hold two offices simultaneously? (This common law doctrine applies only to public "officers" as opposed to "employees.")

Do the offices overlap in jurisdiction, such that the official's loyalty would be divided between the two offices?

Incompatible Offices
Common Law (continued)

If the answer to each of these questions is yes, the holding of the two offices may be incompatible and the first assumed office may have been forfeited by operation of law. (See ch. XI.)

Transportation, Gifts or Discounts
Cal. Const., art. XII, § 7

Is a state or local official, other than an employee, receiving a gift or discount in the price of transportation from a transportation company? (The prohibition covers inter and intrastate transportation in connection with both government or personal business.)

If the answer to this question is yes, the officer may have forfeited his or her office. (See ch. VIII.)

Former State Officials and Their Former Agencies
Political Reform Act
Gov. Code, §§ 87400-87405

Is a former state administrative official being compensated, by other than the State of California, to appear before any court or state administrative agency, in a judicial or quasi-judicial proceeding?

If so, did the official, while in office, participate personally and substantially in the same proceeding?

If so, the official may be prohibited from appearing in the proceeding. (See ch. IV, sec. B.)

Gov. Code, § 87406

Is a former state official receiving compensation for the purpose of communicating with a state agency within a year of his or her departure from state service? (See ch. IV, sec. C.)

Former State Officials and Their Contracts
Pub. Contract Code, § 10411

Is a former state official contracting with the former agency to provide goods and services?

If the answer to this question is yes, a prohibited activity may have occurred. (See ch. VII, sec. C.)

I.

CONFLICT-OF-INTEREST PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87100 Et Seq.*

A. OVERVIEW

The Political Reform Act, Government Code section 81000 et seq. (hereinafter “Act”), was enacted by initiative measure (“Proposition 9”) in June 1974. It is the starting point in any consideration of conflict-of-interest laws in California. Chapter 7 of the Act (Gov. Code, §§ 87100-87500)¹ deals exclusively with conflict-of-interest situations. The Act also limits the receipt of specified gifts and honoraria, which will be addressed in Section L of this chapter separately from the general disqualification provisions of section 87100.

One of the legislative declarations at the outset of the Act forms the foundation of the conflict-of-interest provisions: “Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (§ 81001(b).)

The stated intent of the Act was to set up a mechanism whereby “[a]ssets and income of public officials which may be materially affected by their official actions . . . [are] disclosed and in appropriate circumstances the officials . . . [are] disqualified from acting in order that conflicts of interest may be avoided.” (§ 81002(c).)

The Fair Political Practices Commission (hereinafter, the “FPPC”) is the agency primarily charged with the responsibility of advising officials, informing the public, and enforcing the conflict-of-interest provisions of the Act.

B. THE BASIC PROHIBITION

Under the Act, public officials are disqualified from participating in government decisions in which they have a financial interest. The Act does not prevent officials from owning or acquiring financial interests that conflict with their official duties nor does the mere possession of such interests require officials to resign from office.

The disqualification provision of the Act hinges on the effect a decision will have on a public official’s financial interests. When a decision is found to have the requisite effect, the

*Selected statutory and regulatory materials appear in appendices A (at p. 126), B (at p. 127), C (at p. 129), and D (at p. 159).

¹All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

official is disqualified from making, participating in making, or using his or her official position to influence the making of that decision at any stage of the decisionmaking process.

By establishing a broad, objective disqualification standard, the Act attempted to cover both actual and apparent conflict-of-interest situations between a public official's private interests and his or her public duties. It is not necessary to show actual bias on the part of the official and generally it is not even necessary to show that an official's assets or the amount of his or her income will be affected by a decision in order to trigger disqualification. Other more attenuated effects may also bring about an official's disqualification.

Even though this is a broad disqualification requirement, it is by no means all inclusive. Conflicts arising out of matters other than a financial interest are outside the purview of the Act, e.g., friendship, blood relationship, or general sympathy for a particular viewpoint.

To determine whether a conflict of interest exists under the Act, the FPPC applies an eight-step process.

- STEP 1: Is the individual a public official? (See Section C of this chapter.)
- STEP 2: Is the public official making, participating in making, or influencing a governmental decision? (See Section D of this chapter.)
- STEP 3: Does the public official have one of the six qualifying types of economic interest? (See Section E of this chapter.)
- STEP 4: Is the economic interest directly or indirectly involved in the governmental decision? (See Section F of this chapter.)
- STEP 5: Will the governmental decision have a material financial effect on the public official's economic interests? (See Section G of this chapter.)
- STEP 6: Is it reasonably foreseeable that the economic interest will be materially affected? (See Section H of this chapter.)
- STEP 7: Is the potential effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public? (See Section I of this chapter.)
- STEP 8: Despite a disqualifying conflict of interest, is the public official's participation legally required? (See Section J of this chapter.)

The answers to these questions will assist you in determining whether a conflict of interest exists. If it does, and no exceptions apply, disqualification is required.

It should be noted at the outset that the Act deals with conflict-of-interest situations on a transactional, or case-by-case, basis. This means that situations must be assessed for possible conflicts of interest in the light of their individual facts. The Act demands continual attention

on the part of officials. They must examine each transaction from the Act's perspective to determine if a conflict of interest exists which triggers the disqualification requirement. (See Section L of this chapter for a discussion of the limits on gifts and honoraria.)

C. STEP 1: IS A PUBLIC OFFICIAL INVOLVED?

By its terms, the Act applies to "public officials." (§ 87100.) As that term is used in the Act, it encompasses not only elected and appointed officials in the ordinary sense of the word, but also any "member, officer, employee or consultant of a state or local government agency." (§ 82048.) The term "public official" also encompasses individuals who hold an office or a position listed in Government Code section 87200, including "other public officials who manage public investments" as that term is defined in FPPC regulations. (Cal. Code Regs., tit. 2, § 18701(b)(1).) Officials of all special purpose districts in the state are included, along with virtually all officers and employees at every level of state and local government. The definition of "public official" also encompasses non-employees who are "consultants" because they perform certain duties much like employees. Note that judges of courts and certain other judicial officials and the State Bar are expressly not included within the disqualification provisions otherwise applicable to all public officials. (§ 82048.) Economic disclosure provisions are, however, applicable to judges and court commissioners, as discussed *post*. (§ 87200.)

Neither the Act nor FPPC regulations specifically defines the terms officer or employee. However, the FPPC has defined the term "member" and "consultant." As to "members," the FPPC has, in keeping with the broad scope of the Act, interpreted the Act to apply to the members of all boards or commissions with decisionmaking authority. (Cal. Code Regs., tit. 2, § 18701(a)(1).) It makes no difference whether such board members are salaried or unsalaried. (*Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Com.* (1977) 75 Cal.App.3d 716.) For example, the "public members" on boards and commissions are subject to the provisions of the Act. (Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975).) The FPPC has determined that a board or commission possesses decisionmaking authority whenever:

1. It may make a final governmental decision (Cal. Code Regs., tit. 2, § 18701(a)(1)(A); *In re Maloney* (1977) 3 FPPC Ops. 69; *In re Rotman* (1987) 10 FPPC Ops. 1; and *In re Vonk* (1981) 6 FPPC Ops. 1.)
2. It may compel or prevent the making of a governmental decision by its action or inaction (Cal. Code Regs., tit. 2, § 18701(a)(1)(B)); or
3. Its recommendations are regularly approved without significant modification (Cal. Code Regs., tit. 2, § 18701(a)(1)(C); *In re Rotman, supra*).

California Code of Regulations, title 2, section 18701, subsection (a)(1)(C) refers to bodies which are technically advisory, but which the FPPC views as decisionmaking, since their "advice" generally is followed by the recipient body. This standard involves the determination of whether the board or commission in question has established a track record of having its recommendations regularly approved. (See *Commission on Cal. State Gov.*

Org. & Econ. v. Fair Political Practices Com., *supra*, 75 Cal.App.3d 716; see also *In re Rotman*, *supra*, [for a discussion of redevelopment project area committees].)

The final category of officials affected by the Act is that of “consultant.” To qualify as a consultant, an individual must either be:

- delegated specified decisionmaking authority; or
- while acting in a “staff capacity,” either participate in the making of a decision or perform the duties of an officer or employee of a government agency.

Examples of the type of delegated decisionmaking authority that may make an individual a consultant include the power to approve a rule or regulation; adopt or enforce a law; issue, deny, or suspend a permit, license or entitlement; or grant agency approval to a contract, plan, or report.

The phrase “staff capacity” is a term of art that is delineated in advice letters of the FPPC. (*Dresser* Advice Letter, No. I-02-022; *Thomas* Advice Letter, No. A-98-185; *Cronin* Advice Letter, No. I-98-155; *Ferber* Advice Letter, No. A-98-118.) Factors to consider in determining whether a person is working in a staff capacity include: whether the duties involve general advice or assistance as opposed to a single or limited number of projects; whether the duties will be completed within a year; and whether the duties are sporadic or on-demand, as opposed to ongoing. (*Dresser* Advice Letter, No. I-02-022.)

Individuals who contract to provide services or advice to a government agency that do not satisfy the criteria set forth in the regulation are not consultants and, therefore, not public officials for purposes of the Act. If an individual is not a public official, no further inquiry is necessary as to the remaining seven steps.

D. STEP 2: IS THE OFFICIAL MAKING, PARTICIPATING IN THE MAKING OF, OR USING HIS OR HER OFFICIAL POSITION TO INFLUENCE THE MAKING OF A GOVERNMENTAL DECISION?

Once it has been determined an individual is a government official, the next step is to determine if the official’s actions are covered. The official’s actions are covered if the official is: (1) making, (2) participating in the making of, or (3) influencing or attempting to influence a decision.

1. Actually Making A Decision

Decision making includes voting on a matter, appointing a person to a position, obligating one’s agency to a course of action on an issue, or entering into a contract for the agency. (Cal. Code Regs., tit. 2, § 18702.1(a)(1)-(4).) Determining not to act in any of those ways is also “making a decision” under the Act. (Cal Code Regs., tit. 2, § 18702.1(a)(5).)

2. Participation In Decision Making

The proscriptions of the Act encompass a broad range of activities beyond the most obvious actions such as voting or contracting, since the language “participate in making . . . a governmental decision” is included in the general prohibition. (§ 87100.) The FPPC has interpreted “participation” to include (1) negotiations without significant substantive review and (2) advice by way of research, investigations, or preparation of reports or analyses for the decision maker, if these functions are performed without significant intervening substantive review. (Cal. Code Regs., tit. 2, § 18702.2.)

Three areas of activity which would otherwise fall within the literal definition of participating in the making of a decision have been expressly excluded.

First, participation does not include actions which are solely ministerial, secretarial, manual, or clerical. (Cal. Code Regs., tit. 2, § 18702.4(a)(1).) These functions are excluded from the definition of participation because they do not involve policy making judgment or discretion. Since the official performing these activities has no substantive role in the decision, there is no fear that the decision will be affected as a result of his or her financial interests. Accordingly, there is no purpose in disqualifying the official from performing these functions.

Second, a public official may appear before his or her own public agency for the purpose of representing his or her personal interests. (Cal. Code Regs., tit. 2, § 18702.4(a)(2) and (b)(1).) The purpose of this exclusion is to allow citizens to exercise their constitutional rights to communicate with their government. However, the exclusion is limited in that it applies to situations in which the decision will solely affect the official’s personal interests (e.g., real property or business solely owned by the official or members of his or her immediate family). To the extent that there are other persons who have the same interest, e.g. other stockholders in a corporation, the official with the conflict is disqualified from addressing his or her agency in any way on that issue. With respect to appearing before one’s own agency or any other agency over which the official’s agency has appointment authority or budgetary control, see subsection 3, Influencing Decision Making, below, and Cal. Code Regs., tit. 2, § 18702.3(a).

Third, by necessity, participation also does not include actions by a public official with regard to his or her compensation for services or the terms or conditions of his or her employment or contract. (Cal. Code Regs., tit. 2, § 18702.4(a)(3).)

3. Influencing Decision Making

The Act, in section 87100, prohibits a public official from “in any way attempting to use his or her official position to influence a governmental decision” when the official has a financial interest. The addition of this final category of prohibited activity was intended to ensure that public officials do not act indirectly to affect their private economic interests by utilizing their official status or activities. It specifically

includes attempting to affect any decision within the official's own agency or any agency appointed by or subject to the budgetary control of his or her agency. (Cal. Code Regs., tit. 2, § 18702.3(a).) Contacts with agency personnel or other attempts to influence on behalf of an official's business entity, client or customers are prohibited. (Cal. Code Regs., tit. 2, § 18702.3(a).)

The FPPC regulations specifically exempt oral or written communications by an official, made as any other member of the general public, solely to represent his or her personal interests. Personal interests include: an interest in real property; or a business entity which is wholly owned by the official or members of his or her immediate family; or a business entity over which the official or the official and his or her spouse exercise sole control. (Cal. Code Regs., tit. 2, § 18702.4(b)(1)(A)-(C).) Communications with the media or general public, negotiation with one's own agency regarding compensation, and specific written and oral architectural presentations also are exempt from coverage. (Cal. Code Regs., tit. 2, § 18702.4(b)(2)-(5).)

In addition to the general provisions of the Act, the Legislature created a special prohibition for state officials, including members of all state advisory bodies. Section 87104 specifically provides that no state official:

- shall for compensation act as agent or attorney for any other person;
- before his or her state agency;
- if the appearance or communication is made for the purpose of influencing a contract, grant, loan, license, permit or other entitlement for use.

The prohibition contained in section 87104 is not applicable to local government officials unless they serve on a state body or state advisory body. However, the disqualification requirement contained in section 87100 generally would achieve the same result since local public officials may not make, participate in making, or use their official position to influence the making of government decisions which materially affect their sources of income. (Note: Section 87104 covers all state advisory bodies, whereas section 87100 covers only those advisory bodies with decisionmaking authority.) (See Cal. Code Regs., tit. 2, § 18701(a)(1)(C).)

When a decision is not before the official's own agency, nor an agency over which the official's agency has budgetary control, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official purports to act on behalf of his or her agency in communications with any official of another agency. Such actions include the use of official stationery. (Cal. Code Regs., tit. 2, § 18702.3(b).)

As noted at the outset (Chapter I, Section B, The Basic Prohibition, *ante*), several elements must be present for a conflict of interest to exist. Having discussed who is a covered public official and the types of actions (e.g., making decisions), that are

covered, we must still inquire: does the official have a statutorily defined economic interest; is it reasonably foreseeable that his or her governmental decision could affect that interest materially; and is that effect distinguishable from the effect of that decision on the public generally. If the answer to all three inquiries is yes, the official probably has a disqualifying financial interest under the Act.

E. STEP 3: DOES THE PUBLIC OFFICIAL HAVE ONE OF THE SIX QUALIFYING TYPES OF ECONOMIC INTEREST?*

Many variables come into play in determining when an official has a financial interest in the outcome of a decision sufficient to require the official to disqualify himself or herself from action on the matter. (For more discussion of economic interests and their required disclosure under the Act, see Chapter II of this pamphlet.)

Specifically, the Act addresses six kinds of interests: (1) investments in business entities, (2) interests in real property, (3) sources of income, (4) sources of gifts and their agents or intermediaries, (5) positions with business organizations, and (6) personal finances of the official and the official's immediate family. (§ 87103(a)-(e).) In the case of each category (except the fifth), the Act specifies the minimum amount of holdings, income or gifts which must exist before a qualifying interest is created. An official with a holding, income or gift which is less than the minimum, need not be concerned with the Act's disqualification provisions since such property or income does not constitute an "interest" under the Act. But a holding, income or gift equal to or greater than the minimum value creates the potential for a "material financial effect" on the official's economic interests, which affects the official's interest differently from the way the decision affects the public generally.

1. Investments In Business Entities

With regard to investments in a "business entity," any direct or indirect investment of \$2,000 or more creates an "interest" for the official. "Business entity" is defined in the Act and essentially means an organization that is operated for profit. (§ 82005.) Business entities include corporations, partnerships, joint ventures, sole proprietorships, and any other type of enterprise operated for a profit. Investments do not include bank accounts; interests in mutual funds, money market funds or insurance policies; or government bonds or securities. (§ 82034.)

By opinion, the FPPC defined the investment relationship between limited and general partners. (*In re Nord* (1983) 8 FPPC Ops. 6.) If the limited partnership is "closely held" as defined by statute, a limited partner is deemed to have an "investment" in his or her general partner.

When the limited partner has such an investment, he or she must disqualify with respect to decisions affecting the general partner personally or through business entities controlled by the general partner. However, limited partners do not have an investment in other limited partners.

*Selected statutory materials appear in appendix B (at p. 127).

The FPPC also has defined the economic relationship between parents, subsidiaries and otherwise related business entities. An official who has an economic interest in one such entity is also deemed to have an interest in all other such entities. A parent corporation is one that has a 50 percent or greater ownership interest in a subsidiary corporation. (Cal. Code Regs., tit. 2, § 18703.1(d)(1).) One business entity is related to another business entity, if the one business entity or its controlling owner is a controlling owner of the other business entity, or if management and control is shared between the entities. (Cal. Code Regs., tit. 2, § 18703.1(d)(2).)

“Indirect investment” is defined to include investments owned by an official’s spouse (as either separate or community property), by dependent children, or by someone else on behalf of the official, i.e., a trust arrangement. (§ 82034; § 87103; Cal. Code Regs., tit. 2, §§ 18234, 18235.) Indirect investment also includes any investments held by a business entity in which the official, his or her spouse, and their dependent children collectively have a 10 percent or greater interest. (§ 82034.)

In Cal.Atty.Gen., Indexed Letter, No. IL 76-35 (February 13, 1976), this office advised that a member of the South Central Regional Coastal Commission had a conflict of interest and should disqualify from participation, where the official owned the requisite amount of stock in a corporation which was party to an appeal to the state commission. The stock had been placed in trust with the official’s spouse and children as income beneficiaries. The commissioner was trustor. The official thus had both an investment and an income interest which gave rise to a “financial interest” under the Act. (See also, *In re Biondo* (1975) 1 FPPC Ops. 54.)

2. Interests In Real Property

An official has an “interest in real property” when the official, spouse or dependent children have a direct or indirect equity, option, or leasehold interest of \$2,000 or more in a parcel of property (e.g., ownership, mortgages, deeds of trusts, options to buy, or joint tenancies) located in, or within two miles of, the geographical jurisdiction of the official’s agency (e.g., within two miles of city boundaries for city officials). (§§ 82033, 82035.) It should be noted that the \$2,000 threshold applies to the value of the official’s interest, based upon the fair market value of the property itself. Special provisions exist with respect to the disclosure of, or disqualification in connection with, leasehold interests. (See § 82033; Cal. Code Regs., tit. 2, §§ 18233, 18707.9(b) and 18729; *In re Overstreet* (1981) 6 FPPC Ops. 12.)

3. Source Of Income

A public official has an economic interest in any source of income that is either received by or promised to the official and totals \$500 or more in the 12 months prior to the decision in question. Income includes loans, other than loans from commercial lending institutions in the ordinary course of business made on terms available to the general public. (§ 87103(c).) The FPPC regulations make it clear that a conflict of interest results whenever either the amount or the source of an official’s income is affected by a decision. (Cal. Code Regs., tit. 2, §§ 18704.5, 18703.3(a), 18705.3,

18705.5(a)); see also *Witt v. Morrow* (1977) 70 Cal.App.3d 817.) Detrimental as well as positive effects on the amount or source of income can create a conflict of interest. For example, a decision which foreseeably will materially affect an official's employer would necessitate disqualification even if the amount of income to be received by the official were not affected. (*In re Sankey* (1976) 2 FPPC Ops. 157.) (See discussion *post* regarding affects on an official's personal finances.)

Income generally includes earned income such as salary or wages; gifts; reimbursements of expenses; proceeds from sales, regardless of whether a profit was made; certain loans; and monetary or nonmonetary benefits, whether tangible or intangible. (§ 82030(a).) Income also includes the official's community property interest in his or her spouse's income (the official would meet the \$500 threshold if the spouse received \$1,000 of income), but does not include dependent children's income. (*In re Cory* (1976) 2 FPPC Ops. 48.) (Note: This differs from treatment of dependent children's interests in a business entity or in real property as previously discussed.)

An elected officer may not accept personal loans of \$500 or more unless the officer complies with specified requirements set forth in section 87461. (See also section 87460 which prohibits certain high-level public officials from receiving personal loans from persons who contract with or are employed by the official's agency.)

Common exclusions from the definition of income include: campaign contributions; government salaries and benefits; certain types of payments from nonprofit organizations; informational materials; inheritances; interest received on time deposits; dividends or premiums from savings accounts; and dividends from securities registered with the Securities and Exchange Commission. (§ 82030(b).) With the exception of gifts, the definition of income does not include payments from a source located outside of the official's jurisdiction that does not do business in the jurisdiction, does not plan to do so, and has not done so within the past two years. (§ 82030(a).)

This office interpreted the income provisions of the Act in Cal.Atty.Gen., Indexed Letter, No. IL 75-249 (November 10, 1975) and concluded that no conflict of interest existed where the wife of a deputy superintendent of schools was a supervisor in the same county. Her community property share of her husband's salary from the county was not "income" within the meaning of the Act because it was a government salary specifically exempted by section 82030(b)(2). This exemption does not apply to a decision to hire, fire, promote, demote or discipline the spouse, or to set a salary for the spouse that is different from salaries paid to other employees in the same job classification or position. (Cal. Code Regs., tit. 2, § 18705.5(b).)

For purposes of disqualification, the FPPC determined that income from a former employer does not create a conflict of interest if (1) the income was accrued or received in its entirety before the official assumed his or her public position; (2) it was received in the normal course of employment; and (3) there was no expectation on the official's part that the official would resume employment with the same employer. (Cal. Code Regs., tit. 2, § 18703.3(b).)

4. Source Of Gifts

Although gifts are included in the definition of income (§ 82030(a)), a separate disqualification provision for gifts was placed in section 87103(e). As is the case with income, this section covers gifts received by or promised to the public official in the 12-month period. In addition to donors, this section also applies to persons who act as agents or intermediaries in the making of gifts.

Section 87103(e) provides that a public official has a financial interest in the donor of gifts aggregating \$250 or more in the 12 months prior to the decision in question. However, the Legislature has provided that the \$250 threshold be adjusted on a biennial basis to correspond with the gift limit established in section 89503. For the years 2003 and 2004 the disqualification threshold has been raised to \$340. (Cal. Code Regs., tit. 2, § 18940.2.)

(See Section L of this chapter for a discussion of the definition of a gift, the valuation of gifts, and limitations on the receipt of gifts and honoraria.)

Ordinarily, the receipt of property or services by a public official without the payment of equal consideration constitutes a gift to the public official. However, under limited circumstances, a gift is made to a public agency rather than to a public official. (Cal. Code Regs., tit. 2, § 18944.2.) In order for a gift to qualify as a gift to an agency rather than an official, four criteria must be satisfied. First, the agency must receive and control the payment. (The payment can be monetary or non-monetary.) Second, the payment must be used for official agency business. Third, although the donor may identify a specific purpose for use of the gift, the agency in its sole discretion must determine the specific official or officials who will use the payment. Fourth, the agency must memorialize receipt of the payment in a written public record. (Cal. Code Regs., tit. 2, § 18944.2.) This writing must establish that the gift was made to the public agency reciting how the first three criteria were satisfied. Further, it must identify the donor and the officials receiving or using the payment, describe the use of the payment, and set forth the nature and amount of the payment. This writing must be filed within 30 days with the person charged with the responsibility of maintaining the agency's statements of economic interests. In addition to the requirements imposed by the FPPC, the Department of Finance has established procedures that state agencies must follow when accepting gifts. (77 Ops.Cal.Atty.Gen. 70 (1994).)

There is a partial exception for specified gifts made to public colleges and universities. (Cal. Code Regs., tit. 2, § 18944.2(b).) In addition, special procedures have been adopted concerning the receipt by an agency of passes or tickets for events. (Cal. Code Regs., tit. 2, § 18944.1.)

5. Business Positions

An official has an economic interest in any business entity in which he or she is an officer, director, employee, or holds any business position, irrespective of whether he or she has an investment in or receives income from the entity.

6. Personal Financial Effect

An official has an economic interest in his or her own finances and those of his or her immediate family (spouse, dependent children -- §§ 87103; 82029; Cal. Code Regs., tit. 2, § 18703.5). If it is reasonably foreseeable that a decision will have a financial effect on the official or a member of his or her immediate family that is distinguishable from the decision's effect on the public generally, then disqualification is required whenever the magnitude of the effect will be "material." (§ 87103; Cal. Code Regs., tit. 2 § 18703.5.) A financial effect includes increasing or decreasing the personal expenses, income, assets, or liabilities of the official or members of the official's immediate family. (Cal. Code Regs., tit. 2 § 18703.5.) This does not include effects on the official's real property interests or investment interests. Nor does it include an official's governmental salary, per diem, or benefits, unless the decision is to hire, fire, promote, demote, suspend without pay or other disciplinary action against the official or his or her immediate family member, or to set salary for the official or an immediate family member that is different from salaries paid to other employees of the same agency in the same job classification.

F. STEP 4: IS THE ECONOMIC INTEREST DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

The standard applied to determine whether a decision will have a material financial effect on the public official's interest depends upon whether the interest is directly or indirectly involved. If the interests are directly involved, materiality is generally presumed and the public official usually will have to disqualify himself or herself from the decision. If the interests are only indirectly involved, generally a graduated set of monetary thresholds will be applied to determine the material financial effect. (Cal. Code Regs., tit. 2, § 18704.1(b).)

1. Direct Involvement

A person or business entity is directly involved in a decision before an official's agency if the person or entity is named as a party to the proceeding conducted by the official's agency or initiates the proceeding by filing an application, claim, appeal or similar request, or is otherwise the subject of a proceeding. (Cal. Code Regs., tit. 2, § 18704.1(a).)

Subsection (b) of regulation 18704.1 generally requires disqualification when a source of income or gifts to the official, or a business entity in which the official has an investment or holds a position, is directly involved in a governmental decision before the official's agency. However, there is an exception for public officials who hold an investment worth \$25,000 or less in a Fortune 500 company, or in a company qualified for listing on the New York Stock Exchange. Public officials with such interests may apply the standards for indirectly involved interests even though the interest in question is in fact directly involved. (Cal. Code Regs., tit. 2, § 18705.1(b)(2).)

In addition, FPPC regulations apply the "direct involvement" standard to decisions in which there is a "nexus" between the purpose for which the official receives income and the governmental decision. (Cal. Code Regs., tit. 2, § 18705.3(c).) If a person is paid to promote or advocate the policies or position of an individual or group, the official may not then participate in a governmental decision that involves that policy or position. Under the regulation, a "nexus" exists if the official receives income in his or her private capacity to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the governmental decision. (Cal. Code Regs., tit. 2, § 18705.3(c).)

The FPPC has advised that the executive director of an organization, who as a part of his or her duties advocates pro-growth positions endorsed by his or her organization, was disqualified from participating in any decisions in his or her capacity as a member of a board that would advance or inhibit the accomplishment of the organization's goals. (*Best Advice Letter*, No. A-81-032.)

California Code of Regulations, title 2, section 18704.2, subsection (a) clarifies when a governmental decision directly involves a public official's interest in real property. A public official is directly involved if the property in which the official has the interest is the subject of the decision that is before the official's agency or if the official's property is located within a 500-foot radius of the subject property. The regulation expressly provides that property is the subject of a decision if the decision involves the zoning, annexation, sale, lease, actual or permitted use of, or taxes or fees imposed on the property in which the official has an interest. It also includes major redevelopment decisions involving establishment or amendment of the redevelopment plan where the official owns property in the redevelopment area. (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.)

An official is also directly involved in a governmental decision that involves the construction of or improvements to public facilities such as water, sewer or streets, that will result in the property receiving new or substantially improved services. (Cal. Code Regs., tit. 2, § 18704.2(a)(6).)

When leasehold property in which a public official has an interest is directly involved in the governmental decision, it is presumed that the decision will have a material financial effect upon the official's interests. This presumption may be rebutted by

proof that it is not reasonably foreseeable that the governmental decision will have an effect on any of the various factors affecting the value of the leasehold. (Cal. Code Regs., tit. 2, § 18705.2(a)(2).)

California Code of Regulations, tit. 2, section 18704.5 provides that whenever a decision will affect the expenses, income, assets or liabilities of the official or his or her immediate family by any amount the official's personal finances are directly involved in the decision.

Finally, there is one overriding exception to the disqualification requirement where a public official's economic interests are directly involved -- the official need not disqualify himself or herself if it can be shown that the governmental decision will have no financial effect on the official or his or her economic interests. (Cal. Code Regs., tit. 2, §§ 18705(c); 18705.1-18705.5.)

To recap, the issue of direct versus indirect involvement will determine the materiality standard to be applied. When the interests of the public official are directly involved, materiality is generally presumed and disqualification required unless the official can demonstrate that the decision will have no financial effect on the official or his or her interests. If the public official's interests are indirectly involved, materiality is not presumed, but rather is frequently measured by a set of graduated thresholds. In the case of business entities, these are primarily tied to the financial size of the entity affected.

2. Indirect Involvement

Interest that are indirectly involved must be evaluated in accordance with step 5 discussed below.

G. STEP 5: WILL THE GOVERNMENTAL DECISION HAVE A MATERIAL FINANCIAL EFFECT ON THE PUBLIC OFFICIAL'S ECONOMIC INTERESTS?*

1. Directly Involved Interests

As discussed in Step 4 above, materiality generally is presumed when the public official's economic interests are directly involved in the governmental decision unless the official can demonstrate that the decision will have no effect on the official or his or her interests. (Cal. Code Regs., tit. 2, § 18705(a).)

However, in the case of a personal financial effect on the finances of the official or a member of the official's immediate family, even if the official's interest is directly involved in the decision the effect must be at least \$250 in a 12-month period in

*Selected regulations appear in appendix C (at p. 129).

order to be considered “material” and require the official to disqualify. (Cal. Code of Regs., tit. 2 §§ 18704.5, 18705(a)(5), 18705.5(a).)

2. Indirectly Involved Interests

When an interest is indirectly involved, there is no presumption of materiality; rather, the public official must find and apply the applicable materiality regulation with its graduated thresholds to the governmental decision in question. (Cal. Code Regs., tit. 2, §§ 18705-18705.5.)

a. Business Entities

Materiality is present if the decision will:

- have the specified effects on the gross revenues, assets, or liabilities of the business entity in which the investment is held, or
- permit the business entity to avoid the expenditure of a designated amount of funds. (Cal. Code Regs., tit. 2, § 18705.1.)

Whether an effect on a business entity will be considered material depends on the financial size of the business entity. (Cal. Code Regs., tit. 2, § 18705.1(c).) For example, an effect of only \$20,000 on the gross revenues or assets is material to a small business (Cal. Code Regs., tit. 2, § 18705.1(c)(4)), while an effect of less than \$10 million on the gross revenues or assets may not be material on a Fortune 500 company (Cal. Code Regs., tit. 2, § 18705.1(c)(1).)

b. Real Property

As previously noted when the decision involves another’s real property located within a 500-foot radius of the official’s property, the official’s interest is presumed to be directly involved in the decision. Thus, a material financial effect is presumed unless the decision will have no financial effect on the official’s property. (Cal. Code Regs., tit. 2, §§ 18704.2(a) and 18705.2(a)(1).)

However, when a decision affects another’s property that is more than 500 feet from the official’s property, the official’s interest is only indirectly involved in the decision. When the official’s interest is indirectly involved, the regulation provides that the effect of the decision is presumed not to be material. This presumption may be overturned if it can be shown that the official’s property will be materially affected. Factors leading to such a conclusion include, among others, circumstances where the decision affects:

(1) the development potential of the property; (2) use of the property; and (3) character of the neighborhood. (Cal. Code Regs., tit. 2, § 18705.2(b)(1).)

A public official's leasehold interests that are indirectly involved in a governmental decision are presumed not to be material. However, where specified factors are present, the presumption may be rebutted. (Cal. Code Regs., tit. 2, § 18705.2(b)(2).) The decision may be deemed material if it affects: (1) the legally allowable use where the tenant has the right to sublease; (2) the use or enjoyment of the property; (3) the rent by more than 5%; or (4) the termination date of the lease.

c. Nonprofit Entity

California Code of Regulations, title 2, section 18705.3, subsection (b)(2) defines materiality in the context of a nonprofit entity that is indirectly affected by a decision. Like the regulation governing effects on business entities, it establishes a series of criteria based upon the monetary size of the nonprofit entity.

d. Individuals

California Code of Regulations, title 2, section 18705.3, subsection (b)(3) establishes standards for determining materiality when a governmental decision will have a material effect on an individual who is indirectly involved and who is a source of income or gift to an official. The regulation establishes a materiality threshold of \$1,000 and for real property incorporates the standards in California Code of Regulations, title 2, section 18705.2, subsection (b).

H. STEP 6: IS IT REASONABLY FORESEEABLE THAT THE ECONOMIC INTEREST WILL BE MATERIALLY AFFECTED?

An official is not required to disqualify from participating in a decision unless the effects of the decision that give rise to the conflict of interest are reasonably foreseeable under all of the circumstances at the time the decision is made. The concept of foreseeability hinges on the specific facts of each individual case. For the effect of a decision to be foreseeable, it need not be either certain or direct. However, the possibility that the contemplated effects will in fact occur must be more than merely conceivable. It must appear that there is a substantial likelihood, based on all the facts available to the official at the time of the decision, that the effects that would bring about the conflict of interest will occur. (Cal. Code Regs., tit. 2, § 18706; *Smith v. Superior Court of Contra Costa Co.* (1994) 31 Cal.App.4th 205; *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983; *Witt v. Morrow*, *supra*, 70 Cal.App.3d 817.)

In *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d 983, the court analyzed the issue of foreseeability in the context of an ordinance amending a city's redevelopment plan. Plaintiffs brought suit contending that the amendment was invalid

because a council member's property and business would be foreseeably affected by the amendment. The court stated at pages 991-992:

In determining the reasonably foreseeable effects of the adoption of the redevelopment plan, the court may justifiably consider that the very purpose of redevelopment is to improve the property conditions in the redevelopment area. (Health & Saf. Code, § 33037.) [Fn. omitted.] The fact that it might be possible to conceive of specific redevelopment projects which might fail to affect Mr. Santangelo's property and business does not show the trial court's decision was wrong. The test is whether it was reasonably foreseeable that the adoption of the plan would have a material financial effect on Santangelo's property and business, and we find the trial court's decision supported by reasonable inferences and the record.

. . . Not only did Mr. Santangelo own a valuable property in the amended area which was the site of a real estate business employing 32 persons of which he was the sole proprietor, and own 4 parcels of real property in the original redevelopment area, but also several of his properties were specifically mentioned in reports as possible areas for specific projects. [Fn. omitted.]

In an opinion to the Marin Municipal Water District (*In re Thorner* (1975) 1 FPPC Ops. 198), the FPPC discussed foreseeability in the context of granting exceptions to the county's water moratorium. In the case of one district director, the FPPC concluded that it was not foreseeable that a decision on the moratorium would affect the director's husband's private employer. The FPPC based its decision on the fact that her husband was on salary rather than commission, he was working outside the county, and his employer had only done one project in the county within the past 10 years.

However, another director, who was part owner of a building supply company that was in competition with other firms in the county, was found to have a possible conflict of interest, since there was a reasonable possibility (hence, it was reasonably foreseeable) that decisions on exemptions from the moratorium might either affect the amount of his or her own income or have an effect on his or her business entity.

In *In re Gillmor* (1977) 3 FPPC Ops. 38, the FPPC interpreted the foreseeability requirement in the context of property owned by Gillmor near a redevelopment area.

. . . Thus, it is intended and anticipated that redevelopment will have a financial impact on real property and business located in and near the redevelopment zone.

In the present case, we think it is 'reasonably foreseeable' that these types of positive financial consequences will occur if the property in question is rezoned and the senior citizens' housing complex constructed. . . .

In Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975), this office concluded that the decisions of a state board regulating certain advertising would not materially affect a board member's source of income. In that case, the board member, as a condition of his contract with a television station, recorded a series for an industry, some of whose advertising was regulated by the board. This office reasoned that it was too remote and speculative that a decision to regulate the advertising of a particular industry would materially affect the television station which was the board member's source of income.

By regulation, the FPPC has set forth some guidelines to assist in determining whether a particular decision's effects are "reasonably foreseeable." (Cal. Code Regs., tit. 2 § 18706.) The regulation sets forth certain factors to be considered in making the determination.

- The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction.
- The market share held by the official or the official's source of income in the jurisdiction.
- The extent to which the official or the official's source of income has competition for business in the jurisdiction.
- The scope of the governmental decision in question.
- The extent to which the occurrence of the material financial effect is contingent upon intervening events (not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency).

In addition to the foregoing factors, the regulation expressly provides that possession of a real estate sales or brokerage license, or any other professional license, without regard to the official's business activity or likely business activity, does not in itself make a material financial effect on the official's economic interest reasonably foreseeable.

I. STEP 7: IS THE EFFECT OF THE GOVERNMENTAL DECISION ON THE PUBLIC OFFICIAL'S ECONOMIC INTERESTS DISTINGUISHABLE FROM ITS EFFECT ON THE GENERAL PUBLIC?

If an official has a financial interest within the meaning of the Act and the governmental decision in question will foreseeably have a material effect on that interest, the official still may not be disqualified from participating in the decision. One last variable must be considered: whether the decision will affect the official's economic interest differently than it does those of the "public generally." (§ 87103.) If the official is participating in a decision on an issue that will affect the general public's financial interests in the same manner as it does the official's own, the fact that it is affecting materially the official's interest does not create a conflict of interest for the official.

The policy supporting this provision is that an official probably is not reacting to his or her financial interests to the detriment of the community that the official represents when the official's interests are in harmony with those of the general public or a significant segment of it. Thus, there is no "conflict" when there is a harmony or confluence of interests with a significant segment of the members in the jurisdiction.

Recognizing that no decision will affect every member of the public in the same way, the FPPC, by regulation has defined the term "public generally" to mean a "significant segment" of the public. (Cal. Code Regs., tit. 2, §§18707 and 18707.1.) For a conflict of interest to be avoided, the official's interest must be affected in substantially the same manner as the interests of all members of the group that is determined to constitute a significant segment. If the interests of some members of the significant segment will be affected differently from the interests of others, the official may not avoid disqualification.

In general, the FPPC requires a group of people to be large in number and heterogeneous in nature for it to qualify as a significant segment of the public. (*In re Overstreet, supra*, 6 FPPC Ops. 12; *In re Ferraro* (1978) 4 FPPC Ops. 62.) To the extent it appears to be a narrow, special interest group, it generally would not qualify as a significant segment. (Cal. Atty. Gen., Indexed Letter, No. IL 75-58 (April 8, 1975); *In re Brown* (1978) 4 FPPC Ops. 19; *In re Legan* (1985) 9 FPPC Ops. 1.)

The Fair Political Practices Commission has established specific percentage and numerical thresholds for determining when a group of people constitute a significant segment of the general public, as summarized below:

- Ten percent or more of the population in the jurisdiction of the official's agency or the district that the official represents. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(A)(i).)
- Ten percent or more of all property owners or homeowners in the jurisdiction of the official's agency or the district that the official represents. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(B)(i).)
- Twenty-five percent of all businesses (or 2,000 businesses) in the jurisdiction of the agency or the district which the official represents, so long as the businesses are comprised of other than a single industry, trade or profession. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(C).)
- Five thousand residents of the jurisdiction. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(A)(ii).)
- Five thousand property owners or homeowners in the jurisdiction of the official's agency. (Cal. Code Regs., tit. 2, §18707.1(b)(1)(B)(ii).)

- With respect to an elected state officer, an industry, trade or profession is a significant segment of the general public; with respect to any other elected official, an industry, trade or profession that is predominant in the jurisdiction or district that the official represents is a significant segment of the general public. (Cal. Code Regs., tit. 2, § 18707.7.)

Under limited circumstances, a member of a board or commission may be appointed to represent the interests of a specific economic group or interest. In those circumstances, the group or interest constitutes a significant segment of the general public. (Cal. Code Regs., tit. 2, § 18707.4.) Accordingly, so long as the official's interests are affected in substantially the same manner as those of the group or interest in question, the conflict of interest is vitiated and the official may participate in making the decision. In order for a member to represent a specific economic group or interest, all of the following criteria must be met:

- The statute, ordinance, or other provision of law that creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.
- The member is required to have the economic interest the member represents.
- The board's or commission's decision does not have a material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.
- The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment (50% or more) of the persons the member was appointed to represent.

(Cal. Code Regs., tit. 2, § 18707.4.)

If the statute creating the board or commission does not expressly provide that the member represents the industry, trade or profession and hold the economic interest, it may be inferred that the legislative body impliedly authorized such representation based upon the language of the enabling provision of law, the nature and purposes of the program, legislative history, and any other relevant circumstances. (Cal. Code Regs., tit. 2, § 18707.4(b).)

In addition to the foregoing, the FPPC has adopted special rules interpreting the "public generally exception" in connection with states of emergency (Cal. Code Regs., tit. 2, § 18707.6); and rate making decisions, including those by landowner/water districts (Cal. Code Regs., tit. 2, § 18707.2). Notwithstanding the specific thresholds established in the regulation, exceptional circumstances may nevertheless justify application of the "public generally exception." (Cal. Code Regs., tit. 2, § 18707.1(b)(1)(E).)

Section 87103.5 provides a special interpretation of the “public generally exception” that addresses specific problems concerning retailers in small communities. (See Cal. Code Regs., tit. 2, § 18707.5(b) for numerical thresholds.)

To summarize, if a public official’s financial interests will be affected in substantially the same manner as all members of the public generally, or a significant segment thereof, no conflict of interest exists.

J. STEP 8: DESPITE A DISQUALIFYING CONFLICT OF INTEREST, IS THE PUBLIC OFFICIAL’S PARTICIPATION LEGALLY REQUIRED?

There is an exception in the Act itself to the general prohibition against an official’s participation in decisionmaking when a financial conflict of interest exists. The exception applies when the individual public official involved must act in order that a decision be made or official action be taken. Under such circumstances, and because of the necessity that government continue to function, the official may proceed despite the conflict, after following certain prescribed procedures. (Cal. Code Regs., tit. 2, § 18708.) The exception expressly does not include the situation in which the official’s vote is merely needed to break a tie. (§ 87101.) This exception is similar to, but is different in several important respects from, the common law rule of necessity.

The legally-required-participation provision has been narrowly construed by this office. In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that participation is legally required under the Act (and therefore the exception is applicable) only when the official is faced with the isolated, nonrecurring situation involving a conflict of interest. In reaching this conclusion, this office relied on Government Code section 81003 which provides, “[t]his title should be liberally construed to accomplish its purposes.” If the exception were broadly construed, the central purpose of the Act could be vitiated.

FPPC regulations provide that an official is “legally required to make or to participate” within the meaning of this section only if there is no reasonable alternative manner of decisionmaking. (Cal. Code Regs., tit. 2, § 18708(a).) In determining what is a “reasonable” alternative, the purposes and terms of the statute authorizing the decision must be examined. (Cal. Code Regs., tit. 2, § 18708(a); *Affordable Housing Alliance v. Feinstein* (1986) 179 Cal.App.3d 484; *Brown v. FPPC* (2000) 84 Cal.App.4th 137.) The regulations promulgated by the FPPC detail several steps to be taken by officials who wish to exercise the exception. (Cal. Code Regs., tit. 2, § 18708(b).) Initially, the official must disclose the existence and nature of the conflicting personal financial interest in the outcome of the particular action involved and make it a matter of public record. The official is prohibited from using his or her official position to influence any other public official with regard to the matter. Also, for the record, the official must state exactly why there is no alternative route by which action can be taken. And finally, the official must limit his or her participation to action that is legally required. (Cal. Code Regs., tit. 2, § 18708(b) and (c).) These steps must be closely adhered to in order for the action to be valid. (See *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511.)

Once a member of a body is disqualified, that member may be legally required to participate only if an insufficient number of members remain to constitute a quorum. If a sufficient number of disinterested members exist to form a quorum, their mere absence does not make participation by the disqualified member legally required. (Cal. Code Regs., tit. 2, § 18708(c).)

In *In re Hudson* (1978) 4 FPPC Ops. 13, the FPPC outlined its interpretation of the legally-required-participation exception when multiple members of a body are disqualified. The FPPC concluded that if a quorum of the body were still available to participate in the making of the decision, the disqualifications must stand. If the disqualifications leave less than a quorum of the board's membership available to act, the legally-required-participation exception is triggered. However, unlike the common law rule of necessity, all disqualified members do not return to voting and participating status; rather, only the number of members needed to constitute a quorum are brought back to participate. (See also *In re Brown, supra*, 4 FPPC Ops. 19, 25, fn. 4; *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050.) The process by which disqualified members may return for this limited role may be accomplished by a random drawing. (Cal. Code Regs., tit. 2, § 18708(c)(3).)

In *In re Hopkins* (1977) 3 FPPC Ops. 107, the FPPC concluded that the legally-required-participation exception could not be used to rehabilitate board members who were disqualified by virtue of the acceptance of gifts. In issuing this opinion, the FPPC was concerned that a person appearing before a board or commission could make lavish disqualifying gifts to all members of the board and still be able to gain a favorable decision when a quorum of the board members was rehabilitated. The prospect of rendering one's public agency helpless to act was intended to be a strong deterrent against the acceptance of disqualifying gifts.

K. REQUIREMENT TO ANNOUNCE CONFLICT AND LEAVE MEETING

Once a public official determines that he or she has a financial interest in a decision under the Act, necessitating disqualification, questions arise about the appropriate procedures to be followed. Both the Act and the FPPC regulations are silent with respect to the procedures to be followed by officers or employees who are not members of boards and commissions.

1. Public Officials Covered By Government Code Section 87105

For the very limited types of public officials who are covered by section 87200 and who also are subject to either the Brown Act or the Bagley-Keene Open Meeting Act, specific statutory requirements apply as set forth in detail in Government Code section 87105 and the FPPC's implementing regulation. The list of affected officials is as follows: city councils, boards of supervisors, planning commissions, certain retirement investment boards, Public Utilities Commission, Fair Political Practices Commission, Energy Commission and Coastal Commission.

Generally, when one of these officials is disqualified from participating in a decision because of a conflict of interest, the official must publically announce the specific financial interest that is the source of the disqualification. (Cal. Code Regs., tit. 2,

§ 18702.5(b)(1).)) After announcing the financial interest, the official usually must leave the room during any discussion or deliberations on the matter in question and the official may not participate in the decision or be counted for purposes of a quorum. (§ 87105; Cal. Code Regs., tit. 2, § 18702.5(b)(3).)

In the case of a closed session, the disqualified official still must publically declare his or her conflict in general terms but need not refer to a specific financial interest. (Cal. Code Regs., tit. 2, § 18702.5(c).) A disqualified official may not attend a closed session or obtain any confidential information from the closed session. (Cal. Code Regs., tit. 2, § 18702.5(c); *Hamilton v. Town of Los Gatos*, *supra*, 213 Cal.App.3d 1050.)

2. Public Officials Not Covered By Government Code Section 87105

A public official who is not covered by section 87105 (either because the official is not covered by section 87200 or because the official's position is not covered by the Brown Act or the Bagley-Keene Open Meeting Act) is not subject to these same rules. (Cal. Code Regs., tit. 2, §§ 18702.1(d) and 18702.5(a).) Neither the Act nor implementing regulation requires the officials to leave either the room or the dias. (See Cal. Code Regs., tit. 2, § 18702.1(a)(5), (b) and (c).) However, nothing in these regulations either authorizes or prohibits an agency by local rule or custom from requiring a disqualified member to step down from the dias and/or leave the meeting room. These disqualified officials still may not attend a closed session or obtain any confidential information from the closed session. (Cal. Code Regs., tit. 2, § 18702.1(c).)

All of the restrictions discussed above are separate and apart from the official's right to appear in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. (Cal. Code Regs., tit. 2, § 18702.4.)

L. LIMITATIONS ON AND REPORTABILITY OF GIFTS AND HONORARIA

1. Limits On Gifts

The Act limits the amount of gifts that can be received by specified officials and candidates from a single source during the calendar year to \$250, adjusted biennially by the FPPC to reflect changes in the Consumer Price Index. (§ 89503(f); Cal. Code Regs., tit. 2, § 18940.2.) These limits are separate from the prohibition against receiving gifts totaling \$10 or more a month, if provided by or arranged by a lobbyist. (§§ 86203-86204.) The covered officials and candidates, and corresponding gift limitations, effective as adjusted on January 1, 2003 (Cal. Code Regs., tit. 2, § 18940.2(b)), are set forth below:

- **Elected State or Local Officer or Candidate:** \$340. (§ 89503(a) and (b); Cal. Code Regs., tit. 2, § 18940.2(a).)

- **State Board Member or State or Local Designated Employee:** \$340 if the receipt of the gift would have to be reported as a gift or income from that source on the member's or designated employee's statement of economic interests (exception for part-time members of governing boards of public institutions of higher education unless that position is an elective office). (§ 89503(c) and (d); Cal. Code Regs., tit. 2, § 18940.2(a).) (For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests, since such persons are covered by the prohibition and should be included in the agency's conflict of interest code.)
- **Any Person Covered by Section 87200 Except Judges, but Including Judicial Candidates:** \$340. (§ 89503(a) - (d).)

2. Limits On Honoraria

The Act prohibits the receipt of honoraria by elected state and local officers and candidates and by persons described in section 87200. (§ 89502(a) and (b).) Members of state boards and state or local designated employees are prohibited from receiving honoraria from any source of income that is required to be reported on the official's statement of economic interests. (§ 89502(c).) The prohibition does not apply to judges or non-elected, part-time members of governing boards of institutions of higher education. (§ 89502(d).) The prohibition does, however, apply to judicial candidates. (§ 89502(b).)

3. Reportability Of Gifts

Gifts aggregating \$50 or more in a calendar year from a single source generally must be reported. (§ 87207.) A "gift" is anything of value that provides a personal benefit for which adequate consideration was not provided in return. Generally, the recipient of the benefit has the burden of demonstrating that any consideration paid was of equal or greater value than the benefit received. A gift is received when the recipient takes possession of the gift or exercises some direction or control over it. (Cal. Code Regs., tit. 2, § 18941(a).) However, for purposes of the disqualification requirement, when there is a promise to make a gift, the gift is received on the date on which it is offered so long as the recipient knows of the offer and ultimately receives the gift or exercises some direction or control over it. (Cal. Code Regs., tit. 2, § 18941(b).)

Both a source of a gift and any intermediary in the making of a gift must be disclosed. (§§ 87210, 87313; Cal. Code Regs., tit. 2, § 18945.3.) The gifts of an individual donor are aggregated with any gift by an entity in which the donor is more than a fifty percent (50%) owner. (Cal. Code Regs., tit. 2, § 18945.1.) When a gift is made by multiple donors, the group of donors must be generally identified, and any individual donors of \$50 or more must be named. (Cal. Code Regs., tit. 2, § 18945.4.)

Under specified circumstances, a gift may be made to a public agency rather than to an individual. (Cal. Code Regs., tit. 2, §§ 18944.1, 18944.2; see Section E, subsection 3(b) of this chapter.)

4. Reportability Of Travel Expenses

Reportable travel expenses of an official or candidate should be reported on the special schedule created by the FPPC for that purpose. (§ 87207(c); Cal. Code Regs., tit. 2, 18950.1(a)(2)(B).)

5. Special Rules On Travel

A variety of special rules apply to the receipt of travel expenses. Depending on the surrounding circumstances, such expenses may be prohibited, limited, reportable, or totally exempt from coverage under the Act.

a. Totally Exempt

1. The following travel expenses, when provided to an official or candidate (“filer”) who gives a speech, participates in a panel or seminar, or performs a similar service, are not payments and are not subject to any prohibition, limitation or reporting obligation (see Cal. Code Regs., tit. 2, § 18950.3):
 - (i) Free admission, refreshments and non-cash nominal benefits provided to a filer during the entire event;
 - (ii) actual intrastate transportation to and from the event;
 - (iii) any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar or service, including meals and beverages on the day of the activity.

In other words, qualifying food, beverages, nominal benefits, accommodations and intrastate transportation in connection with giving a speech or appearing on a panel are not limited, prohibited, or reportable as gifts, income, or honoraria under the Act. In effect, these payments are invisible.

2. Travel expenses paid from campaign funds are not honoraria or gifts so long as they are expressly authorized by section 89513(a). (§ 89506(d)(1); Cal. Code Regs., tit. 2, §§ 18950.1(c) and 18950.4.)
3. Travel expenses paid for by an official’s public agency do not constitute honoraria or gifts. (§ 89506(d)(2); Cal. Code Regs., tit. 2, § 18950.1(d).)

4. Travel expenses that are provided to a principal or employee of a business and which are reasonably necessary in connection with the operation of a bona fide business, trade or profession, that would qualify for a business deduction under the federal income tax laws (I.R.C. §§ 162 and 274) are not honoraria or gifts unless the predominant activity of the business is making speeches. (§ 89506(d)(3); Cal. Code Regs., tit. 2, § 18950.1(e).)

b. Reportable but Not Limited

The travel expenses discussed below are not subject to the gift and honoraria limits contained in the Act. However, such travel expenses may trigger the basic disqualification requirement contained in section 87100 (see *ante* under Sections A through J of this chapter). In addition, if the reporting threshold (\$50) is reached, the expenses must be reported by the official or candidate on any applicable statement of economic interests.

Travel expenses are not subject to the limitations on gifts and honoraria if the travel is reasonably related to a legislative or governmental purpose or to an issue of public policy and either of the following apply:

1. The travel expenses are in connection with a speech given by an official or candidate; the lodging and subsistence is limited to the day before, the day of, and the day after the speech; and the travel is within the United States; or
2. the travel is provided by a government agency (foreign or domestic), an educational institution under Internal Revenue Code section 203, or a nonprofit organization which is tax exempt under Internal Revenue Code section 501(c)(3). (§ 89506(a); Cal. Code Regs., tit. 2, § 18950.1.)

Although not limited, these travel expenses are generally reportable pursuant to Gov. Code §§ 87207(c), 89506(c).

c. Both Reportable and Limited

To the extent that travel expenses are not exempt as described above, they are subject to both the disclosure requirement and the gift and honoraria limitations.

6. Definition Of Gift

As previously noted, a gift is anything of value that provides a personal benefit, either tangible or intangible, to a public official or candidate for which the donor has not received equal or greater consideration. (§ 82028(a).) Gifts frequently include money, food, transportation, accommodations, tickets, plaques, flowers and articles

for household, office, or recreational use. A gift also includes a rebate or discount in the cost of a product or service, unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.

The Act and FPPC regulations contain a number of exemptions from the basic definition of a gift. Items that are exempt from the gift definition provisions are likewise exempt from any reporting or limitations placed on gifts. The rules providing for these exemptions are quite technical and complex. Below is a summary of the major exemptions from the definition of gift.

a. Informational Material

Material that serves primarily to convey information and is provided to assist the official or candidate in the performance of his or her official duties, or the elective office he or she seeks is exempt as “informational material.” These materials may include books, magazines, maps, models, etc. (Cal. Code Regs., tit. 2, § 18942.1.) If the item is a scale model, pictorial representation, or map, and the value is \$340 or more (this amount is adjusted biennially; see Section L, subsection 1, of this chapter), the recipient has the burden of demonstrating that the purpose of the material is to assist the recipient in performing his or her official duties in order for the item to be exempt. (Cal. Code Regs., tit. 2, § 18942.1(b).) Travel is not informational material, except that on-site tours or visits designed specifically for public officials or candidates are informational material. However, transportation to and from the site is not deemed informational material unless there are no commercial or other normal means of travel to the site (such as by private auto). (§ 82028(b)(1); Cal. Code Regs., tit. 2, § 18942.1(c).)

b. Returned Unused

Gifts are exempt if unused and returned within 30 days to the donor or donated to a government agency or nonprofit entity exempt from taxation under § 501(c)(3) of the Internal Revenue Code so long as a charitable tax deduction is not taken. (§ 82028(b)(2); Cal. Code Regs., tit. 2, § 18943(a).) Specific procedures for returning gifts in order to avoid disqualification are set forth in California Code of Regulations, title 2, section 18943(b). A recipient may negate a gift or may reduce a gift’s value by reimbursing the donor for some or all of the gift within 30 days of receipt or acceptance of the gift. (Cal. Code Regs., tit. 2, § 18943(a)(4).) As a general rule, a recipient may not negate the receipt of a gift by turning the item over to another person or discarding it. (Cal. Code Regs., tit. 2, § 18941(a)(3).) (However, see different rule for passes and tickets *post* under Section L, subsection (7)(a) of this chapter.)

c. Relatives

Gifts from close family relatives (e.g. spouse, children, siblings, grandparents, aunts and uncles) are specified as exempt. (§ 82028(b)(3); Cal. Code Regs., tit. 2, § 18942(a)(3).)

d. Campaign Contributions

Bona fide campaign contributions are exempt. (§ 82028(b)(4); Cal. Code Regs., tit. 2, § 18942(a)(4).)

e. Plaques or Awards

A plaque or trophy that is personalized, for the recipient in question, and which has a value of less than \$250 is exempt. (§ 82028(b)(6); Cal. Code Regs., tit. 2, § 18942(a)(6).)

f. Home Hospitality

Hospitality provided by an individual in his or her home is not a gift when the donor or a member of his or her family is present. (Cal. Code Regs., tit. 2, § 18942(a)(7).)

g. Exchange of Gifts

Gifts exchanged between an official or candidate and another individual, other than a lobbyist, in connection with birthdays, Christmas, other holidays or similar events are exempt, so long as the gifts exchanged are not substantially disproportionate in value. (Cal. Code Regs., tit. 2, § 18942(a)(8).)

h. Devise or Inheritance

Section 82028(b)(5); California Code of Regulations, title 2, section 18942(a)(5).

7. Valuation Of Gifts

Gifts are valued as of the date they are received or promised to the recipient. (Cal. Code Regs., tit. 2, §§ 18941(a) and 18946(a).) The value is the fair market value of the gift on that date. If a gift is unique, the value of the gift is the cost to the donor if the cost is known or ascertainable to the recipient. In the absence of such knowledge, the recipient must exercise his or her best judgment in reaching a reasonable approximation of the gift's value. (Cal. Code Regs., tit. 2, § 18946(b).)

a. Passes and Tickets

A ticket providing a single admission to an event or facility, such as a game or theater performance, is valued at the price the ticket is offered to the public. However, the pass or ticket has no value unless it is either used or transferred to another. (Cal. Code Regs., tit. 2, § 18946.1(a).)

A pass or series of tickets which permits repeated admissions to events or facilities is valued as follows: For purposes of disclosure and gift limits the value is based on actual use by the recipient and the recipient's guests, and any possible use by transferees of the pass or tickets. For purposes of disqualification, the value is the actual use by the recipient and the recipient's guests, and any possible use by transferees through the date of the decision in question, plus the maximum reasonable value of the usage following the date of the decision. If this type of pass or tickets is returned prior to the date of the decision, the value is determined by actual use and the value of any retained tickets for future events. (Cal. Code Regs., tit. 2, § 18946.1(b).)

b. Testimonial Dinners

When an official or candidate is honored at a testimonial dinner or similar event, other than a campaign event, the recipient is deemed to have received a gift in the amount of the pro rata share of the cost of the event plus the value of any specific tangible gifts received by the individual. (Cal. Code Regs., tit. 2, § 18946.2.)

c. Wedding Gifts

Generally, wedding gifts are considered to be made to both spouses equally. Therefore, one-half of the gift is attributable to each spouse. If a wedding gift is particularly adaptable to one spouse or intended exclusively for the use of one spouse the gift shall be allocated in whole to that spouse. (Cal. Code Regs., tit. 2, § 18946.3.) Although wedding gifts are exempt from the gift limit, they are reportable and may trigger disqualification. (Cal. Code Regs., tit. 2, § 18942(b)(2)). Moreover, this exemption does not negate the lobbyist gift limit of Government Code section 86203. (Gov. Code § 89503(e)(2) and (g).)

d. Tickets to Political and Nonprofit Fundraisers

Tickets to political fundraisers or fundraisers conducted by nonprofit organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code have no value. The value of tickets to other nonprofit, tax exempt organization fundraisers is the face value minus the value of any donations stated on the ticket, or where no such donation is set forth, the value is the fair market value of food, beverage, or other tangible benefits provided to each attendee. (Cal. Code Regs., tit. 2, § 18946.4.)

e. Prizes and Awards

Generally, prizes and awards are valued at their fair market value. However, a prize or award won in a bona fide competition unrelated to the recipient's status as an official or candidate is not a gift but is income and may be reportable, depending upon the source and amount. (Cal. Code Regs., tit. 2, § 18946.5.)

8. Definition Of Honoraria

In general, an honorarium is a payment made in consideration for any speech given, article published, or attendance at a public or private conference, convention, meeting, social event, meal, or similar gathering. (§ 89501.) However, the definition excludes certain travel-related payments. For information concerning limitations on food, transportation, lodging, and subsistence, see Section K, subsection 5, of this chapter.

A speech includes virtually any type of oral presentation including participation as a panel member. Comedic, dramatic, musical, or artistic performances do not constitute the making of a speech for purposes of the honoraria limitation. (Cal. Code Regs., tit. 2, § 18931.1.)

For purposes of the honoraria limitation, an "article published" refers to a non-fiction written work which is published in a periodical, newsletter, or similar document. An article published in connection with a bona fide business, trade, or profession is exempt from the prohibition. (Cal. Code Regs., tit. 2, § 18931.2.) (A bona fide business is defined in Cal. Code Regs., tit. 2, § 18932.1.) An individual is deemed to have received payment in connection with a published article if he or she receives payment for drafting any portion of the article, or is identified as an author or contributor to the work. (Cal. Code Regs., tit. 2, § 18931.2.)

a. Earned Income

Honoraria does not include earned income for personal services if both of the following apply:

- The services are provided in connection with an individual's business (including nonprofit entities) or employment in a bona fide business, trade, or profession (other than speech making), (§ 89501(b); Cal. Code Regs., tit. 2, § 18932(a)(1) and (b)); and
- The services are customarily rendered as a part of the business. (Cal. Code Regs., tit. 2, § 18932(a)(2).)

b. Teaching Profession

For purposes of the honoraria limitations, an individual is presumed to be participating in the profession of teaching if any of the following apply:

- The individual is under contract or employed to teach at a school, college, or university which is accredited, approved, or authorized as an educational institution by the State of California, another state, the federal government or an independent accrediting organization. (Cal. Code Regs., tit. 2, § 18932.2(a).)
- The individual is paid to teach a course which is presented to maintain or improve professional skills and knowledge and where the course provides continuing education credits for members of the profession. (Cal. Code Regs., tit. 2 § 18932.2(b).)
- The individual is paid for teaching individuals who are enrolled in an examination preparation program such as a State Bar examination review course. (Cal. Code Regs., tit. 2, § 18932.2(c).)

c. Return or Donation of Honoraria

The limitations on honoraria do not apply if, within 30 days of the receipt of the honorarium, the honorarium is returned unused or it is donated to the general fund of the agency in question. If the payment is not money and cannot be contributed to the general fund, the recipient may reimburse the donor for the value or use of the honorarium. (§ 89501(b)(2); Cal. Code Regs., tit. 2, § 18933.)

Donations made to a charity by a third person in return for a speech by an individual do not constitute honoraria to the speaker pursuant to California Code of Regulations, title 2, section 18932.5, if all of the following conditions apply:

- The donation is made directly to the charity;
- the speaker does not make the donation a condition for making the speech or appearance;
- the donation is not claimed as a tax exemption by the speaker;
- the donation will not have a foreseeable material financial effect on the speaker or the speaker's immediate family; and
- the speaker is not identified to the recipient charity in connection with the donation.

Honoraria which is so donated or reimbursed need not be reported by the speech maker.

M. SPECIAL RULES FOR ELECTED STATE OFFICERS

Because section 87102 exempts elected state officers from the Act's remedies for violation of section 87100, special disqualification prohibitions have been created for these officials. (§§ 87102.5-87102.8.) With respect to legislators, these prohibitions generally are imposed where legislators have specified interests in non-general legislation, i.e., legislation which affects only a small number of persons and does not affect the general public. (§ 87102.6.) Members of the Legislature are also prohibited from participating in, or using their official position to influence state government decisions in which the member has a financial interest, and which do not involve legislation. (§ 87102.8.)

Elected state officers are prohibited from participating in decisions of their agency where the decision would affect a lobbyist employer which has provided compensation to that officer for appearing before a local board or agency, and where the decision will not affect the general public. (§§ 87102.5(a) and (b); 87102.8(b).) With respect to legislators, this prohibition applies to persons who are not lobbyist employers as well. (§ 87102.5(a)(7).)

II.

ECONOMIC DISCLOSURE PROVISIONS UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Section 87200 Et Seq.*

A. OVERVIEW

In addition to the requirement that public officials disqualify themselves from conflict-of-interest situations, public officials whose decisions could affect their economic interests are required under the Political Reform Act of 1974 (hereinafter “Act”) to file economic interests disclosure statements which are public records. Disclosure serves the two-fold purpose of making assets and income of public officials a matter of public record and reminding those public officials of their economic interests. By focusing their attention on their interests, officials will be able to identify conflict-of-interest situations and disqualify themselves from participating in decisions when appropriate. Moreover, questions from the media and interested citizens often aid in the public discussion of conflict-of-interest issues and assist in their resolution.

Articles 2 and 3 of Chapter 7 of the Act deal with disclosure of economic interests by public officials. These provisions were challenged in the case of *Hays v. Wood* (1979) 25 Cal.3d 772, as unconstitutionally overbroad and as violative of privacy rights. The court rejected these claims holding that the disclosure scheme established in the Act was not overbroad and that any infringements on the official’s right to privacy or associational freedom was justified by the limited disclosure needed to prevent a conflict of interest. (See also, *Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662.)

B. PERSONS COVERED

The Act provides that all state and local officials, who foreseeably may materially affect private economic interests through the exercise of their public duties, must disclose such interests. Some persons are required to file disclosure statements because of the positions they hold and others are required to file because of their job duties. The disclosure requirements for constitutional officers, members of the Legislature, county supervisors, city council members, mayors, judges, and other high ranking officials are set forth in Government Code sections 87200-87210.² All other officials who make or participate in the making of decisions are covered by conflict of interest codes adopted pursuant to Government Code sections 87300-87313. The promulgation and administration of conflict of interest codes will be discussed in Section F of this chapter. Under Government Code section 87200 et seq., high ranking state and local officials must disclose all income,

*Selected statutory materials appear in appendix B (at p. 127).

²All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

gifts, interests in real property, and investments located in or doing business in their jurisdiction. The disclosure requirements for all other officials depend upon the power of the individual by virtue of his or her official position to affect financial interests.

C. STATEMENTS OF ECONOMIC INTERESTS

Public officials disclose their private economic interests in a document entitled “Statement of Economic Interests.” (Form 700.) (For information concerning public access to these statements, see Section E of this chapter.) There are three basic types of statements of economic interests: assuming office; annual; and leaving office. As the names of these statements suggest, public officials must report their economic interests when they begin public service, annually thereafter, and when they leave service. In addition, candidates for the elective offices specified in section 87200 et seq., (other than appellate or supreme court justices), must file candidate statements. (§ 87201.) The time for filing candidate statements is set forth in section 87201, for those subject to its provisions, and in conflict of interest codes for all other candidates.

D. CONTENT OF STATEMENTS

In general, an official’s statement of economic interests discloses the types of interests in real property, investments, business positions, and sources of income and gifts which he or she potentially could affect in his or her official capacity. (For a brief discussion of these economic interests, see Chapter I, Sections E and L. For specific instructions, see the disclosure forms and manual of the FPPC or contact the FPPC directly.)

Except for the disclosure of gifts, officials need not disclose the specific amount of their economic interests. They are merely required to mark the appropriate value range applicable to their economic interests, e.g., less than \$2,000; \$2,000 to \$10,000; \$10,000 to \$100,000; or \$100,000 or more. By merely indicating the applicable value range, the public is alerted at least partially to any potential conflict of interest, and the official’s privacy is safeguarded from those who are merely curious about the degree of the official’s wealth. (*City of Carmel-By-The Sea v. Young* (1970) 2 Cal.3d 259.)

If income is received or an interest in real property or investment is held at any time during the period covered by the statement, it must be disclosed. Officials are required to report all interests in real property and investments held by their spouses and dependent children and their community property interest in the income of their spouses. (§§ 82030, 82033, 82034.) Officials who own a 10 percent or greater interest in a business entity must disclose the sources of income to, and the interests in real property and investments held by, the business entity if the applicable prorated dollar thresholds are satisfied. (§§ 82030, 82033, 82034.) Similar disclosure provisions exist with respect to trusts. (See Cal. Code Regs., tit. 2, § 18234.) Assets held by a truly blind trust that meets the standards contained in FPPC regulations are not disclosable. (See Cal. Code Regs., tit. 2, § 18235.)

Except for gifts, the disclosure of income, interests in real property, business positions and investments need not be reported if there is not a sufficient connection between the official's economic interest and the jurisdiction of the official's office or agency. Thus, an interest in real property must be disclosed only if it is within the official's jurisdiction or within two miles of it. (§§ 82033, 82035.) Similarly, a source of income, or a business entity in which an official has an investment or holds a business position, must be reported only if the source or entity is located in the jurisdiction, is doing business in the jurisdiction, is planning to do business in the jurisdiction, or has done business within the jurisdiction during the past two years. Once again, the purpose for this limitation is to protect the official's privacy in financial affairs that are beyond the official's power to affect. (See, *City of Carmel-by-the-Sea v. Young*, *supra*, 2 Cal.3d 259.) In reporting income, the appropriate value range is determined by the gross amount received, rather than the net. (*In re Carey* (1977) 3 FPPC Ops. 99.) Therefore, an official may have reportable income even when he or she sells a car, land, or an investment at a loss.

For a discussion of gifts, including definitions, valuation and reporting, see Chapter I, Section E, subsection 4; Chapter I, Section L, specifically subsections 3 through 8.

E. PUBLIC ACCESS TO STATEMENTS OF ECONOMIC INTERESTS

Every official covered by section 87200 or a conflict of interest code must file a statement of economic interests with his or her agency unless another filing officer is specifically designated. Statements of certain officials are forwarded to the FPPC by their respective agencies; these include constitutional officers, members of the Legislature, county supervisors, mayors, city council members, planning commissioners, city managers, city attorneys, and judges.

All statements of economic interests are available for public inspection during regular business hours. Persons wishing to examine statements may not be required to identify themselves and may only be charged a maximum of ten cents (\$0.10) per page for copies of statements. For a statement five years old, a \$5.00 retrieval fee may be added. (§ 81008.)

F. CONTENTS AND PROMULGATION OF CONFLICT OF INTEREST CODES

Every agency taking actions that foreseeably may materially affect economic interests must adopt a conflict of interest code for its employees. A conflict of interest code lists those employees or officers who have disclosure obligations (designated employees) and prescribes the types of interests which must be disclosed by such officials (disclosure categories). For purposes of this pamphlet, the term "designated employee" refers to any officer, consultant or employee of the agency who participates in the making of decisions which foreseeably could have a material financial effect on any of his or her economic interests. Such persons are covered by the disqualification prohibition and should be included in the agency's conflict of interest code. Employees who perform merely ministerial or manual tasks, or members of advisory non-decisionmaking boards, as defined by FPPC regulations, are not subject to a conflict of interest code. The public is entitled to participate in the code adoption process as provided for in section 87311 and the applicable open meeting law (for local

government bodies, The Brown Act, contained in Gov. Code, § 54950 et seq.; for state bodies, The Bagley-Keene Open Meeting Act, contained in Gov. Code, § 11120 et seq.). You may contact the Office of the Attorney General for information on the applicable open meeting law. For more information about the promulgation and contents of conflict of interest codes, contact the FPPC. The FPPC can provide sample lists of designated employees, model disclosure categories, and other aids.

When a conflict of interest code is adopted by an agency, it must be submitted to the “code reviewing body” for approval. As a general rule, the code reviewing body is an agency independent of the promulgating agency, e.g., FPPC for state departments; or city council for city departments. Once the conflict of interest code is approved by the code reviewing body, it must be reviewed periodically to determine whether changed circumstances necessitate its amendment. (§ 87306(a).) A review must occur at least once every two years. (§§ 87306(b); 87306.5.) In particular, the list of designated employees and the disclosure categories should be reflective of the agency’s current organization and ability to affect economic interests. (§ 87306(a).) If the agency fails to adopt a conflict of interest code or to initiate necessary amendments, a resident of the jurisdiction can compel such amendments. (§§ 87305; 87308.)

G. PENALTIES AND ENFORCEMENT

Sections 87200-87313 are a part of the Political Reform Act. For a discussion of penalties and enforcement under the Act, see Chapter V of this pamphlet.

III.

CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS

Government Code Section 84308*

A. OVERVIEW

As previously noted in Chapter I, discussing financial conflicts of interest under the Political Reform Act of 1974 (hereinafter “Act”), campaign contributions are not a basis for disqualification by directly elected public officials. (See §§ 82028(a)(4), 82030(b)(1)³; *Woodland Hills Residents Assoc. v. City Council of the City of Los Angeles* (1980) 26 Cal.3d 938.) However, because of the increased concern about the link between campaign contributions and alleged conflict-of-interest situations, the Legislature enacted section 84308 in 1982.

B. THE BASIC PROHIBITION

Briefly stated, Government Code section 84308 provides the following:

- (1) The law applies to proceedings on licenses, permits, and other entitlements for use pending before certain state and local boards and agencies.
- (2) Covered officials are prohibited from receiving or soliciting campaign contributions of more than \$250 from parties or other financially interested persons during the pendency of the proceeding and for three months after its conclusion. Note: Local laws may impose limits on campaign contributions that are lower than \$250. (§ 85703 et seq.)
- (3) Covered officials must disqualify themselves from participating in the proceeding if they have received contributions of more than \$250 during the previous 12 months from a party or a person who is financially interested in the outcome of the proceeding.
- (4) At the time parties initiate proceedings, they must list all contributions to covered officials within the previous 12 months.
- (5) The law expressly exempts directly elected state and local officials except when they serve in a capacity other than that for which they were directly elected.

*Selected statutory materials appear in appendix E (at p. 162).

³All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

A more comprehensive description of the provisions of section 84308 is set forth below. If you have specific questions, you should consult the actual wording of the statute, and the regulations of the Fair Political Practices Commission (hereinafter, “FPPC”).

C. PERSONS COVERED

The law applies to two types of individuals: covered officials and interested persons.

Covered officials typically include state and local agency heads and members of boards and commissions. (§§ 84308(a)(3) and 84308(a)(4); Cal. Code Regs., tit. 2, § 18438.1.) Alternates to elected or appointed board members and candidates for elective office in an agency also are covered. (§ 84308(a)(4); Cal. Code Regs., tit. 2, § 18438.1(c).) Covered officials do not include city councils, county boards of supervisors, the Legislature, constitutional officers, the Board of Equalization, judges and directly elected boards and commissions. However, these officials are not exempt from coverage when they sit as appointed members of other boards or bodies (e.g., joint powers agencies, regional government bodies, etc.). (§ 84308(a)(3), (a)(4); Cal. Code Regs., tit. 2, § 18438.1.)

Interested persons refers to persons who are financially interested in the outcome of specified proceedings (e.g., parties and participants). Parties (e.g., applicants or subjects of the proceeding) are always presumed to be financially interested in the outcome. In addition, persons or entities that satisfy both of the following criteria are financially interested and are called “participants”: (1) they foreseeably would be materially financially affected by the outcome of the decision as those terms are defined in Government Code section 87100 et seq.; and (2) they have acted to influence the decision through direct contacts with the officials or their staffs. (§ 84308(a)(1), (a)(2), (b) and (c); Cal. Code Regs., tit. 2, § 18438.4.)

When a closely held corporation is a party or participant in a proceeding, the requirements of the law apply to the majority shareholder. (§ 84308(d).)

D. AGENTS

Agents of parties and participants are subject to the same prohibitions and requirements as their principals. (§ 84308(b), (c).) A person is an agent under section 84308 if he or she represents an interested person in connection with the covered proceeding. (Cal. Code Regs., tit. 2, § 18438.3(a).) If an individual acting as an agent is also acting as an employee or member of a law, architectural, engineering, or consulting firm, both the individual and the firm are considered agents. (Cal. Code Regs., tit. 2, § 18438.3(a).)

To determine whether the threshold of more than \$250 for triggering the contribution prohibition or disqualification requirement has been reached, contributions made within the preceding 12 months from parties or participants are aggregated with those of their agents. Contributions from an individual agent include contributions from that agent’s firm but do not include contributions from other individual partners or members of the firm unless such contributions are reimbursed by the firm. (Cal. Code Regs., tit. 2, § 18438.3(b).)

E. PROCEEDINGS COVERED

The law covers proceedings involving a license, permit, or other entitlement for use. These terms include all business, professional, trade and land use licenses and permits, and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises. (§ 84308(a)(5).) The law covers conditional use permits, zoning variances, rezoning decisions, tentative subdivision and parcel maps, and consulting contracts (but does not apply to general land use plans or general building and development standards). (*City of Agoura Hills v. Local Agency Formation Com.* (1988) 198 Cal.App.3d 480; *In re Curiel* (1983) 8 FPPC Ops. 1.) Ministerial decisions also are not covered. (Cal. Code Regs., tit. 2, § 18438.2(b)(3).)

F. REQUIRED CONDUCT

Section 84308 imposes various requirements – in connection with the making or receipt of campaign contributions – on covered officials, parties, and participants involved in specified proceedings. As used in section 84308, the term “contribution” refers to money, goods or services provided in connection with federal, state, or local political campaigns. (§ 84308(a)(6).)

1. Disclosure

At the time parties initiate proceedings, they must disclose on the record of the proceeding all covered officials to whom they, or their agents, made contributions of more than \$250 during the previous 12 months. (§ 84308(d).) Similarly, officials, must, at the beginning of the hearing, disclose on the record of the proceeding any party or participant who has contributed more than \$250 during the previous 12 months. (§ 84308(c); Cal. Code Regs., tit. 2, § 18438.8.) If there is no public hearing, the disclosure must be entered on the written record of the proceeding. (Cal. Code Regs., tit. 2, § 18438.8.) As will be discussed subsequently, receipt of such contributions may necessitate the disqualification of the official from the decisionmaking process.

2. Prohibition On Contributions

During the pendency of the proceeding involving the license, permit, or entitlement for use, and for a period of three months thereafter, parties and participants are prohibited from making contributions of more than \$250 to covered officials involved in the proceedings. (§ 84308(d).) Likewise, covered officials are prohibited from soliciting or receiving such contributions from parties or from participants who they know or have reason to know are financially interested in the outcome of the proceeding. (§ 84308(b).) Covered officials also are prohibited from soliciting, receiving, or directing contributions on behalf of another person or on behalf of a committee. (§ 84308(b).) (But see, Cal. Code Regs., tit. 2, § 18438.6 for exceptions.)

3. Disqualification

If, prior to making a decision in a covered proceeding, more than \$250 in contributions has been willfully or knowingly received by an official from a party or their agent during the previous 12 months, the official must disqualify himself or herself from participating in the proceeding. (§ 84308(c).) A similar prohibition exists with respect to contributions received from a participant, or his or her agent, if the official knows or has reason to know that the participant is financially interested in the outcome of the proceeding. (§ 84308(c); Cal. Code Regs., tit. 2 § 18438.7.) If an official returns the contribution (or that portion which is over \$250) within 30 days from the time he or she knows or has reason to know of the contribution and the proceeding, then disqualification is not required. (§ 84308(c).)

4. Knowledge

In order for the contribution prohibition and disqualification requirement to apply, the covered official must have the requisite knowledge of (1) the contribution and (2) the fact that the source of the contribution is financially interested in the proceeding. By regulation, the FPPC provides that the knowledge requirement is satisfied with respect to the contribution when either the covered official has actual knowledge of it or it has been disclosed on the record of the proceeding. (Cal. Code Regs., tit. 2, § 18438.7(c).) With respect to the official's knowledge of the financial interest of the source of the contribution, parties are conclusively presumed to be financially interested. (§ 84308(a)(1), (b), (c); Cal. Code Regs., tit. 2, § 18438.7(a)(1).) With respect to participants, the covered official's knowledge requirement is satisfied if the participant reveals facts to the agency that make his or her financial interest apparent. (§ 84308(a)(2), (b), (c); Cal. Code Regs., tit. 2, § 18438.7(a)(2).)

G. PENALTIES AND ENFORCEMENT

Section 84308 is a part of the Political Reform Act. For a discussion of penalties and enforcement provisions under the Act, see Chapter V of this pamphlet.

IV.

LIMITATIONS ON FORMER STATE OFFICIALS APPEARING BEFORE STATE GOVERNMENT AGENCIES

Government Code Section 87400 Et Seq.*

A. OVERVIEW

Historically, there has been a regular flow of personnel between government and the private sector. Sometimes, individuals from the private sector enter government for a short tenure of service and then return to their private enterprise occupations. Other times, individuals with longstanding government service who have developed expertise choose to leave government service and join the private sector. In still other instances, elected officers retire or are defeated and return to private industry.

The Political Reform Act of 1974 (hereinafter, the “Act”) includes Government Code section 87400 et seq., commonly known as the “Revolving Door Prohibition.”⁴ The Legislature also has enacted categorical restrictions on post-government employment. Section 87406 places restrictions on former government officials from contacting specified government agencies. These sections constitute the only general state law regulating the activity of former government officials who enter the private sector. (But see Pub. Contract Code, § 10411, for additional specific prohibitions.)

In addition, the Act prohibits public officials from participating in government decisions relating to any person with whom the official is negotiating concerning future employment. (§ 87407.)

If a former local government official wishes to influence his or her former agency, the official should consult local laws and rules to determine if there are limitations on his or her activities. Special provisions for air pollution control districts appear in section 87406.1.

B. LIFETIME RESTRICTIONS

1. The Basic Prohibition

The basic prohibition contained in section 87400 et seq. provides that: (1) no former state administrative official, (2) shall for compensation act as agent or attorney for any person other than the State of California, (3) before any court or state administrative agency, (4) in a judicial or quasi-judicial proceeding if previously the

*Selected statutory materials appear in appendix F (at p. 163).

⁴All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

official personally and substantially participated in the proceeding in his or her official capacity. (See *In re Lucas* (2000) 14 FPPC Ops. 15.)

If the elements of the prohibition are found to be present, a former state administrative official is forever banned from acting as an agent or attorney in a covered proceeding or from assisting another to so act.

2. State Administrative Official

State administrative officials include every member, officer, employee or consultant of a state administrative agency who, as part of his or her official responsibilities, engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity. (§ 87400(b).) State administrative agencies include every office, department, division, bureau, board and commission of state government, but do not include the Legislature, the courts or any agency in the judicial branch. (§ 87400(a).)

3. Compensation For Representation As Agent Or Attorney

The statutory prohibition extends only to former state administrative officials who, for compensation, represent someone else as agent or attorney. (§ 87401, 87402.) Former officials who provide representation without compensation are not covered by the prohibition. (Cal. Code Regs., tit. 2, § 18741.1(a)(2).) Representing an individual as part of one's employment constitutes receiving compensation for such representation. A firm which has as one of its partners a former administrative official generally may not represent persons in covered proceedings, because the official ultimately will benefit directly or indirectly from the compensation paid to the firm for such representation. However, where a former administrative official merely shares office space and some other overhead expenses with another attorney, that attorney would not be prohibited from handling such cases so long as the former administrative official were in no way involved in fee splitting or the representation. (*Zatopa* Advice Letter, No. A-82-095.)

The statute specifies the types of conduct which constitute prohibited representation of another in a covered proceeding (e.g., § 87402). It prohibits any formal or informal appearance or any written or oral communication with an intent to influence the covered proceeding. The prohibition on representation applies only to proceedings in which the State of California is a party or in which it has a direct or substantial interest. (§ 87401(a), (b); Cal. Code Regs., tit. 2, § 18741.1(a)(3).) In addition, the statute prohibits former administrative officials, for compensation, from aiding or assisting another to represent a person in a covered proceeding. (§ 87402; Cal. Code Regs., tit. 2, § 18741.1(a)(2).) Thus, if a former administrative official would be prohibited from personally acting as the client's representative, he or she is also prohibited, for compensation, from aiding or assisting another in such representation.

4. Court Or Quasi-Judicial Proceeding

It is important to note that the statute applies only to judicial, quasi-judicial or other proceedings involving specific parties before a court or administrative agency (§ 87400(c); *Xander* Advice Letter, No. A-86-162; *Berrigan* Advice Letter, No. A-86-045.) Thus, quasi-legislative proceedings of an agency for the purposes of adopting general regulations do not trigger the prohibition. (*Nutter* Advice Letter, No. A-86-042; *Swoap* Advice Letter, No. A-86-199.) Participation in a lawsuit, an administrative enforcement action under section 11500 of the Government Code, or application proceedings are specifically covered. (§ 87400(c).) Any other proceeding which involves a controversy or ruling concerning specific parties also is covered. (§ 87400(c).)

5. Previous Participation

Once it has been determined that a former administrative official is prepared to act as an agent or attorney for another in a court or in an administrative proceeding, it must be determined whether the former official participated in the proceeding during his or her official tenure. (*In re Lucas*, *supra*, 14 FPPC Ops. 15; *Anderson* Advice Letter, No. A-86-324; *Petrillo* Advice Letter, No. A-85-255.) If so, the elements of the prohibition are complete and the former administrative official is prevented from acting in a representative capacity. (§ 87401.) A former administrative official is deemed to have participated in a proceeding only if he or she were personally and substantially involved in some aspect. (§ 87400(d); *In re Lucas*, *supra*, 14 FPPC Ops. 15; *Brown* Advice Letter, No. A-91-033.) The statute specifically covers personal and substantial participation in a decision, the approval or disapproval of a decision, the making of a formal recommendation, and the rendering of substantial advice. In addition, involvement in an investigation or the use of confidential information qualifies as participation under the statute. (§ 87400(d).) However, the statute specifically exempts from coverage the rendering of legal advice to departmental or agency staff which does not involve specific parties.

Unless covered by a specific exemption, a former administrative official who participated in a covered proceeding in his or her official capacity, is forever banned from receiving compensation for acting as an agent or attorney in that proceeding, or from assisting another to do so. Section 87403 provides several limited exceptions to this general prohibition.

The statute does not prevent a former administrative official from making a statement which is based on his or her own special knowledge of the area, provided that the official does not receive any compensation, other than witness fees as set forth by law or regulation. (§ 87403(a).) The statute also exempts communications made solely for the purpose of providing information if the court or administrative agency to which the communication is directed first makes specified findings. (§ 87403(b).) The court or administrative agency must find that the former administrative official has outstanding and otherwise unavailable qualifications, that the proceeding in question requires such qualifications, and that the public interest would be served by

participation of the former official. Lastly, where a court or administrative agency has made a final decision but has retained jurisdiction over the matter, it may permit an appearance or communication from the former administrative official if the agency of former employment gives its consent by determining that the former administrative official left office at least five years previously and the public interest would not be harmed by the appearance or communication.

6. Enforcement And Disqualification

Upon petition of any interested person, or party, the court or administrative agency may act to enforce the terms of the statutory prohibition. After notice to the former administrative official, the court or administrative agency may exclude him or her from further participation or from assisting or counseling any other participant. (§ 87404.) In addition, the administrative, civil and criminal sanctions available for enforcement of the Act apply to section 87400 et seq. (See Chapter V of this pamphlet.)

C. ONE-YEAR PROHIBITION

1. The Basic Prohibition

The restrictions prohibit the following former officials from accepting compensation to act as the agent, attorney or representative of another person for purposes of influencing specified government agencies through oral or written communications.

- With respect to members of the Legislature, the law imposes a one-year prohibition on communications with members of the Legislature, members of any legislative committee or subcommittee, or any officer or employee of the Legislature for the purpose of influencing legislative action. (§ 87406(b).)
- With respect to an elected state officer (excluding legislators), the law imposes a one-year prohibition on communications with any state administrative agency, for the purpose of influencing any administrative action or any action or proceeding concerning a permit, license, grant or contract, or the sale or purchase of goods or property. (§ 87406(c).)
- With respect to a state designated employee or member of a state body, the law imposes a one-year prohibition on communications with any state administrative agency – which either employed or was represented by the former official during the last 12 months of his or her government service – for the purpose of influencing: any administrative or legislative action; any action or proceeding concerning a permit, license, grant or contract; or the sale or purchase of goods or property. (§ 87406(d)(1).) (For a discussion of designated employees, see Chapter II, Section F.)

Appearances before a court, a state administrative law judge, or the Workers Compensation Appeals Board are not subject to the prohibitions of section 87406. Also, uncompensated appearances are not subject to the prohibition. The prohibition is not applicable to officials who transfer between state agencies (§ 87406(e); Cal. Code Regs., tit. 2, § 18741.1(a)(2)), and designated employees of the Legislature (§§ 87406(d) and 87400(a)). The prohibitions are also inapplicable to a former state official who holds a local elective office when the appearance or communication is made on behalf of the local agency. (87406(e)(2).)

2. Administrative Or Legislative Action

“Administrative action” means the proposal, drafting, development, consideration, amendment, enactment or defeat of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding. (§ 82002.) “Legislative action” means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination, or other matter by the Legislature or by either house or any committee thereof, or by a member or employee of the Legislature acting in his or her official capacity. “Legislative action” also means the action of the Governor in approving or vetoing any bill. (§ 82037.)

D. JOB SEEKING BY GOVERNMENT OFFICIALS

Prior to leaving government office or employment, the Act prohibits all public officials from making, participating in the making or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any arrangement, concerning prospective employment. (§ 87407; Cal. Code Regs., tit. 2, § 18747.) Previously, this prohibition applied to a more limited list of state officials.

E. GOVERNMENT CODE SECTION 87450

In addition to the disqualification requirements previously discussed in Section I, state administrative officials as defined in section 87400 are disqualified from making, participating in, or using their official position to influence governmental decisions that directly relate to any contract where the official knows or has reason to know that any party to the contract is a person with whom the official, or any member of his or her immediate family, has engaged in any business transaction on terms not available to the public, regarding any investment or interest in real property, or the rendering of any goods or services totaling in value \$1,000 or more within the prior twelve months.

V.

PENALTIES, ENFORCEMENT AND PROSPECTIVE ADVICE UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Sections 83114-83123 and 91000 Et Seq.

A. PENALTIES AND ENFORCEMENT

The Political Reform Act of 1974 (hereinafter, “Act”) provides administrative, civil and criminal penalties for its violation. In past years, the Fair Political Practices Commission (hereinafter, “FPPC”) and local district attorneys have brought numerous enforcement actions that have resulted in millions of dollars of fines. The Attorney General and the district attorney have concurrent jurisdiction over criminal violations at the state level. (§ 91001(a).)⁵ If you have a question about a potential violation of the Act you should contact the FPPC’s enforcement division (428 J Street, 7th Floor, Sacramento, CA 95814, (916) 322-6441 or 1-800-561-1861) or your local district attorney. You can also utilize the FPPC’s website at: <<http://www.fppc.ca.gov>>.

Civil prosecution may be pursued by various persons, including residents of the jurisdiction, depending upon the circumstances. (§ 91001 et seq.)

Administrative penalties are levied by the FPPC after a hearing or stipulation. (§ 83116.) Administrative penalties include a \$5,000 fine per violation, cease and desist orders, and orders to file reports, etc. (§ 83116.) The FPPC has the authority to bring administrative actions against both state and local officials. (§ 83123; see also *McCauley v. BFC Direct Marketing* (1993) 16 Cal.App.4th 1262, 1268-69 [certain provisions of the Act can be addressed only by an FPPC administrative action].)

Injunctive relief may be sought by the civil prosecutor or any person residing in the official’s jurisdiction. (§ 91003(a).) The court, in its own discretion, may require a plaintiff to file a complaint with the FPPC prior to seeking injunctive relief. In the event the action would not have been taken but for the conflict of interest, the court is empowered to void the decision. (§ 91003(b); *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.) The civil prosecutor or any resident of the jurisdiction also may seek civil damages for violations of the Act. (§§ 91004 and 91005.) A plaintiff who prevails in an action brought pursuant to this section may be awarded attorney’s fees. (§ 91012.) Such fees are awarded pursuant to the standards set forth in Code of Civil Procedure section 1021.5, including the use of a multiplier. (*Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528; *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d at p. 997.) A prevailing defendant, however, may be awarded attorney’s fees only if the plaintiff’s suit is frivolous, unreasonable or without foundation. (*People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 816-19; see also *Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562, 574-77.)

⁵All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

The Act also provides misdemeanor criminal sanctions for knowing or willful violations of the Act including fines of up to the greater of \$10,000 or three times the amount involved. (§ 91000.) Generally, a person convicted of violating the Act cannot be a candidate for elective office nor act as a lobbyist for four years after the conviction. (§ 91002.)

In addition, any person who purposely or negligently causes any other person to commit a violation, or aids and abets in the commission of a violation, may be subject to administrative sanctions. (§ 83116.5; *People v. Snyder* (2000) 22 Cal.4th 304.) There are specific exceptions for government and private attorneys who provide advice to persons with filing responsibilities under the Act. (Cal. Code Regs., tit. 2, § 18316.5.)

Generally, legislators and other elected state officers are exempt from administrative, civil and criminal penalties for violation of the disqualification requirement contained in Government Code section 87100; however, the Legislature adopted limited disqualification requirements for legislators and other elected state officers. These disqualification requirements are subject only to administrative enforcement by the FPPC. (§§ 87102.5-87102.8.)

Persons who violate the gift or honoraria limits set forth in Government Code section 89500 et seq. are subject to a civil action brought by the FPPC for up to three times the amount of the unlawful gift or honoraria. (§ 89521.) Violators are also subject to administrative sanctions, which include fines of up to \$5,000 per violation, but are exempt from the civil or criminal penalties contained in section 91000 et seq. (§ 89520.)

The statute of limitations for civil and criminal enforcement actions is four years from the date of violation. (§§ 91000(c) and 91011(b).) The statute of limitations for administrative actions brought by the FPPC is five years from the date of violation. (§ 91000.5.)

The chart which follows briefly describes who has authority to initiate enforcement proceedings under the Act, with respect to each type of proceeding (administrative, civil and criminal).

ENFORCEMENT AUTHORITY FOR THE POLITICAL REFORM ACT

Type of Enforcement Action	Actions Against State Officials	Actions Against Local Officials
Administrative (§ 83115 et seq.)	The FPPC may impose administrative sanctions.	The FPPC may impose administrative sanctions.
Civil (§§ 91001(b), 91001.5, 91003 et seq.)	<p>The FPPC is the civil prosecutor of state officials.</p> <p>The AG is the civil prosecutor of the FPPC and its employees.</p> <p>If the civil prosecutor fails to act, individual residents may file civil suit.</p>	<p>The DA is the civil prosecutor.</p> <p>The elected city attorney of a charter city may act as a civil prosecutor of violations occurring within the city.</p> <p>If the civil prosecutor fails to act, individual residents may file a civil suit.</p> <p>The DA may authorize the FPPC to file a civil suit whenever an individual resident could file suit.</p>
Criminal (§§ 91001(a), 91001.5)	The AG and the DA have concurrent authority.	<p>The DA has authority.</p> <p>The elected city attorney of a charter city may act as criminal prosecutor of violations occurring within the city.</p>

B. PROSPECTIVE ADVICE

Staff members at the FPPC will provide verbal or written advice on the Political Reform Act to assist officials in avoiding prospective violations of the law. Written advice can usually be obtained within 21 working days. (§ 83114(b); Cal. Code Regs., tit. 2, § 18329.) The FPPC also may adopt formal published opinions. (§ 83114(a); Cal. Code Regs., tit. 2, § 18329.) These opinions usually require two commission hearings and two to six months to adopt.

Formal opinions under section 83114(a) provide the requester with complete immunity from the enforcement provisions of the Act so long as the requester provides the FPPC with all material facts and the official follows the FPPC's advice in good faith. Written advice is not a formal opinion nor a declaration of FPPC policy. Therefore, it may provide only "guidance" to persons other than the requestor. (Cal. Code Regs., tit. 2, § 18329(b)(7).)

Written advice pursuant to 83114(b) provides the requester only with immunity from enforcement actions brought by the FPPC itself, if the requestor committed the acts complained of either in reliance on the FPPC's advice or because the FPPC did not provide advice within section 83114's time limits. (§ 83114(b); Cal. Code Regs., tit. 2, § 18329.) "Informal assistance," as opposed to a formal opinion or written advice, rendered by the FPPC does not provide the requestor with the immunity set forth in either section 83114(a) or (b). (Cal. Code Regs., tit. 2, § 18329(c).)

The FPPC may be contacted in writing at 428 "J" Street, Sacramento, California 95814; by phone at (916) 322-5660; and on-line via the FPPC's website at <<http://www.fppc.ca.gov>>.

VI.

CONFLICTS OF INTEREST IN CONTRACTS

Government Code Section 1090 Et Seq.*

A. OVERVIEW

The common law prohibition against “self-dealing” has long been established in California law. (*City of Oakland v. California Const. Co.* (1940) 15 Cal.2d 573, 576.) The present Government Code section 1090⁶, which codifies the prohibition as to contracts, can be traced back to an act passed originally in 1851 (Stats. 1851, ch. 136, § 1, p. 522) and has been characterized as “merely express legislative declarations of the common-law doctrine upon the subject.” (*Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 597.)

Frequently amended in its details, the concept of the prohibition has remained unchanged. In fact, this office and the courts often refer to very early cases when discussing possible violations of this fundamental precept of conflict-of-interest law. (See, for example, *Berka v. Woodward* (1899) 125 Cal. 119.)

In 59 Ops.Cal.Atty.Gen. 604 (1976), this office specifically concluded that the Political Reform Act did not repeal section 1090 et seq. “but that the Political Reform Act will control over section 1090 *et seq.* where it would prohibit a contract otherwise allowable under section 1090 *et seq.*”

Section 1090 basically prohibits the public official from being financially interested in a contract or sale in both his or her public and private capacities. In *Thomson v. Call* (1985) 38 Cal.3d 633, 649, the California Supreme Court reiterated the long-standing purpose and framework of section 1090. The purpose of section 1090 is to make certain that “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.” (*Id.* at p. 650.) The Court also stated:

. . . [T]he principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all of this in his own favor. [Citation.]

(*Id.* at p. 648; see also *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 542.)

*Selected statutory materials appear in appendix G (at p. 167).

⁶ All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

.....

It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual loss to the city or public agency necessary for a section 1090 violation.

(*Thomson v. Call* (1985) 38 Cal.3d at p. 648; emphasis in original; footnote omitted.)

.....

In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of its validity. (*Capron v. Hitchcock* (1893) 98 Cal. 427.)

(*Id.* at p. 649.)

B. THE BASIC PROHIBITION

Section 1090 provides that an officer or employee may not make a contract in which he or she is financially interested. Any participation by an officer or an employee in the process by which such a contract is developed, negotiated and executed is a violation of section 1090. If no contract is involved, or if a contract in which an officer or employee has a financial interest is not ultimately executed, no violation exists. A board member is conclusively presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified himself or herself from any and all participation in the making of the contract.

The prohibition applies to virtually all state and local officers, employees and multi-member bodies, whether elected or appointed, at both the state and local level. Section 1090 does not define when an official is financially interested in a contract. However, the courts have applied the prohibition to include a broad range of interests. The remote interest exception set forth in section 1091 enumerates specific interests which trigger abstention for board members but which do not prevent the board from making a contract. The interests set forth in section 1091.5 are labeled "non-interests" in that, once disclosed, they do not prevent an officer, employee or board member from participating in a contract.

Generally, any contract made in violation of section 1090 is void and cannot be enforced. In addition, an official who commits a violation may be subject to criminal, civil and administrative sanctions.

C. PERSONS COVERED

Virtually all board members, officers, and employees are public officials within the meaning of section 1090. (*Thomson v. Call*, *supra*, 38 Cal.3d 633 [council member]; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [council member]; *People v. Vallergera* (1977) 67 Cal.App.3d 847 [county employee]; *People v. Sobel* (1974) 40 Cal.App.3d 1046 [county employee]; *Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th 533; 70 Ops.Cal.Atty.Gen. 271 (1987) [contract city attorney].) Beginning in 1986, section 1090 became applicable to school boards pursuant to Education Code section 35233. Section 1090 also applies to members of advisory bodies if they participate in the making of a contract through their advisory function. (82 Ops.Cal.Atty.Gen. 126 (1999).)

Board members are conclusively presumed to be involved in the making of all contracts under their board's jurisdiction. (*Thomson v. Call*, *supra*, 38 Cal.3d at p. 649.) With respect to all other public officials, it is a question of fact as to whether they were involved in the making of the contract.

The status of consultants is not entirely clear. This office's opinion in 46 Ops.Cal.Atty.Gen. 74 (1965) continues to represent our views concerning the applicability of Government Code section 1090 to consultants and independent contractors. In that opinion, we concluded that a consultant who performed a feasibility study could not compete for the resulting contract. That opinion hinged on our determination that the section 1090 prohibition against conflicts of interest by "officers and employees" applied to consultants and independent contractors exercising judgment on behalf of public entities. We subsequently ratified this decision in 70 Ops.Cal.Atty.Gen. 271 (1987). The particular issue of follow-on contracts by consultants of state agencies has been specifically addressed in section 10365.5 of the Public Contract Code which codifies the result in 46 Ops.Cal.Atty.Gen. 74, *supra*, albeit through a different statutory vehicle.

Independent contractors, who serve in positions that are frequently held by officers, or employees such as city attorneys, have also been subject to section 1090 in the past. (*Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th 533; *People v. Gnass* (2002) 101 Cal.App.4th 1271; 70 Ops.Cal.Atty.Gen. 271 (1987).) It has also been held that Government Code section 1090 applies to a special city attorney retained under contract. Such an attorney is an "officer and agent" of the city. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206-207.)

However, in recent years, several trial courts throughout the state have concluded that section 1090 does not apply to consultants and independent contractors because they are not in fact "employees." At least one appellate court has hinted at this possibility as well. (*NBS Imaging Systems, Inc. v. State Bd. of Control* (1997) 60 Cal.App.4th 328, fn.13.) Absent an authoritative appellate court decision, we continue to embrace our interpretation as representing a sound and appropriately broad application of section 1090.

D. PARTICIPATION IN MAKING A CONTRACT

Having determined that a public official is involved, the next issue is whether the decision in question involves a contract which was “made” in his or her official capacity. The use of the term “made” in the statute indicates that a contract must be finalized before a violation of section 1090 can occur. Once a contract is made, section 1090 would be violated if the official had participated in any way in the making of the contract. (See *People v. Sobel, supra*, 40 Cal.App.3d 1046.)

In *People v. Sobel, supra*, 40 Cal.App.3d 1046, 1052, the court outlined the broad reach of section 1090:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

In determining whether a decision involves a contract, one should refer to general contract principles. (84 Ops.Cal.Atty.Gen. 34 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) However, the provisions of section 1090 may not be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (*People v. Honig* (1996) 48 Cal.App.4th 289, 314; see also *People v. Gnass, supra*, 101 Cal.App.4th 1271.) Three situations that were not readily apparent have been analyzed by this office. In 78 Ops.Cal.Atty.Gen. 230 (1995), this office determined that a development agreement between a city and a developer was a contract for purposes of section 1090. (See also, 85 Ops.Cal.Atty.Gen. 34 (2002).) In 75 Ops.Cal.Atty.Gen. 20 (1992), section 1090 was interpreted to prohibit a hospital district from paying the expenses for a board member’s spouse to accompany the board member to a conference. The opinion concluded that the board member had a financial interest in the payment of his or her spouse’s expenses and that the payment itself constituted a contract. Finally, this office concluded that a certificate of public convenience and necessity from a City to operate an ambulance service is not a contract but rather is in the nature of a license, and therefore is regulatory in nature. The same analysis applies to the rate schedule which regulates the prices that the ambulance company can charge its riders. (84 Ops.Cal.Atty.Gen. 34 (2001).)

Participation in a decision to modify, extend or renegotiate a contract constitutes involvement in the making of a contract under section 1090. In *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, the city entered into a contract for construction and operation of a concession stand on a pier. Later, one of the owners was elected to the city council. Under the contract, the provider had an option to renew the contract and seek an adjustment of rates. The court concluded that exercise of this option would require the city council to affirm the contract and negotiate a rate structure. In so doing, the city would be making a contract within the meaning of section 1090. In 81 Ops.Cal.Atty.Gen. 134 (1998), this office opined that where an existing contract required periodic renegotiation of payment terms, the modification of such terms constituted the making of a contract. Likewise, sending the

payment issue to arbitration or merely allowing the existing terms to continue would also constitute the making of a contract.

With respect to the making of a contract, the court in *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, held that the test is whether the officer or employee participated in the making of the contract in his or her official capacity. The court defined the making of the contract to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (See also *Stigall v. City of Taft* (1962) 58 Cal.2d 565; *People v. Sobel*, *supra*, 40 Cal.App.3d at p. 1052.)

These, and similar interpretations, make it clear that the prohibition contained in section 1090 also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley*, *supra*, 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. However, because advisory boards do not actually enter into contracts, members with a financial interest in a contract may avoid a conflict by merely disqualifying themselves from any participation in connection with the contract. (82 Ops.Cal.Atty.Gen. 126 (1999).)

If an official is a member of a board or commission that actually executes the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 645, 649.) This absolute prohibition applies regardless of whether the contract is found to be fair and equitable (*Thomson v. Call*, *supra*, 38 Cal.3d 633; *People v. Sobel*, *supra*, 40 Cal.App.3d 1046) or the official abstains from all participation in the decision. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201.)

Where the contract is not under the jurisdiction of the board member, the contract is not automatically prohibited by section 1090. (See, 81 Ops.Cal.Atty.Gen. 274 (1998) [where contracts of County Housing Authority Commission were independent from the County Board of Supervisors and consequently could employ a member of the board of supervisors as its executive director]; 85 Ops.Cal.Atty.Gen. 87 (2002) [where a city council member could contract with joint powers authority because it was independent of its city council members]; 21 Ops.Cal.Atty.Gen. 90 (1953) [where contracts of the City Treasurer were not under the supervision or control of the city council]; 3 Ops.Cal.Atty.Gen. 188 (1944) [where a head Court House gardener who owned a private nursery was not disqualified from selling nursery supplies to the county of which he was an employee because of the discretion vested in the county purchasing agent]; 17 Ops.Cal.Atty.Gen. 44 (1951) [where a County Supervisor was not precluded from contracting for construction work with a school district since the contracts for school buildings or school construction are let by Boards of School Trustees without control or supervision of the County Board of Supervisors].) The significant fact in each of these opinions is the independent status of the party contracting on behalf of the governmental agency.

In *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, the court held that a member of the board of a special district who applied for and was offered the position of district manager while still serving on the board violated section 1090. Similarly, in 84 Ops.Cal.Atty.Gen. 126 (2001), this office concluded that section 1090 prohibited a community college board of trustees from contracting with a member of the board to serve as a part-time or substitute instructor. In Cal.Atty.Gen., Indexed Letter, No. IL 92-407 (June 2, 1992), the issue concerned whether a water district could enter into an employment contract with a member of the board of trustees on the proviso that the individual would not be paid any compensation until he resigned his position on the board. The board member in question would disqualify himself from any participation in the board's decision. This office concluded that the proposed contract would violate Government Code section 1090 since board members are conclusively presumed to make all contracts made by the district. Once the board member retires, the district may enter into an employment contract with the former board member, so long as no discussions concerning such employment took place between the board member and his or her colleagues or staff prior to the date of retirement. See also Cal.Atty.Gen., Indexed Letter, No. IL 91-210 (February 28, 1991) (in which Government Code section 1090 was interpreted to prohibit a contract between the school district and a member of its governing board to serve as a substitute school teacher). (See also Gov. Code, § 53227 [which prohibits an employee of a local agency from simultaneously serving on the legislative body of the local agency]; Ed. Code, § 35107(b) and 72103(b) [which specifically applies the same prohibition to school and community college employees].) These code sections were enacted in response to *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311 (in which a hospital employee was permitted to hold office as an elected member of the hospital board of directors).

Where one agency's decision to contract is subject to review and modification by another agency, this office concluded that both agencies were participating in the making of the contract. In 77 Ops.Cal.Atty.Gen. 112 (1994), a city airport commission awarded a contract for the construction of a new airport terminal. The design of the terminal also had to be approved by the city's art commission, and all modifications ordered by the art commission had to be made free of charge to the city. The question posed was whether the contract could be awarded to an architectural firm where a member of the firm simultaneously was a member of the art commission. The opinion concluded that a member of the firm who sat as a member of the art commission would have a financial interest in the contract because each modification ordered by the art commission would impose costs on the architectural firm which could not be recouped from the city. Accordingly, the opinion concluded that the contract could not be awarded to an architectural firm where a member of the firm simultaneously was a member of the art commission.

In *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565, the court concluded that where a council member had been involved in the preliminary stages of the planning and negotiating process, but had resigned from the council prior to its vote on the contract, the council member had been involved in the making of the contract. In *City Council v. McKinley*, *supra*, 80 Cal.App.3d 204, 212, the court followed this reasoning and stated:

[T]he negotiations, discussions, reasoning, planning, and give and take which go beforehand in the making of a decision to commit oneself must

all be deemed to be a part of the making of an agreement in the broad sense [citation] If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit nor the intent of the law which precludes an officer from involving himself in the making of a contract.

In 66 Ops.Cal.Atty.Gen. 156 (1983), this office concluded that county employees who proposed that their functions be accomplished through private consulting contracts were barred from contracting with the county to perform such services. This office stated:

We are told that the persons involved, while employees of the county, and as employees of the county, have provided input in the formulation of the contract. . . . By that participation in the give and take that went into such “embodiments” of the contract as the negotiations, discussions, reasoning, planning, and drawing of plans and specifications, the county employees had the opportunity to, and did bring their influence to bear on the ultimate contract itself. While no fraud or dishonesty may have been involved, we are nonetheless satisfied that in so doing they participated, not in their personal capacities but in their official ones as county employees, in the “making of the contract” within the meaning of section 1090.

(*Id.* at p. 160.)

(See also 63 Ops.Cal.Atty.Gen. 19 (1980) [where county officials were prohibited from bidding on surplus county land at a public auction conducted by the county because of participation in the land sale process in their official capacity].)

In 81 Ops.Cal.Atty.Gen. 317 (1998), this office concluded that a council member could not participate in the establishment of a loan program and then leave office and apply for a loan. In Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (January 26, 1993), the issue was whether a former planning commissioner could contract with the city to perform consulting services in connection with revisions of the general plan. The policy decisions, including budgetary considerations, were discussed by the commission prior to the former member’s resignation. This office’s informal opinion concluded:

In short, the former commissioner was an active participant in the overall city policy decision to “contract-out” much of the general plan revision. Accordingly, he cannot now benefit from such participation. (*Cf.* 66 Ops.Cal.Atty.Gen. 156 [county employees could not propose agreement for consultant services, then resign, and provide such consulting services].)

In *Santa Clara Valley Water Dist. v. Gross* (1988) 200 Cal.App.3d 1363, 1369-1370, the court concluded that participation in a statutorily mandated process in connection with the

sale of property through eminent domain did not constitute involvement in the making of a contract. In that case, a water district initiated eminent domain proceedings against a landowner who was a member of the water district’s board of directors. In order to recover litigation expenses, Code of Civil Procedure section 1250.410 requires the parties to file a final demand and offer respectively. Believing they were barred from participating in the demand and offer process by section 1090, the parties failed to file the required documents.

The court concluded that participation in the demand and offer process was mandated by statute and did not violate section 1090, and therefore refused to allow litigation expenses. The court stated:

Once a condemnation action has been filed, however, the property owner and his agency become adversaries, subject to the rules of court and civil procedure which govern the course of litigation. A settlement achieved pursuant to these rules can be supervised by the court and receive the imprimatur of court confirmation. Government Code section 1090 is directed at dishonest conduct and at “conduct that tempts dishonor” (*Thomson v. Call* (1985) 38 Cal.3d 633, 648 [214 Cal.Rptr. 139, 699 P.2d 316]); it has no force in the context of a condemnation action where the sale of property is accomplished by operation of law and each side is ordinarily represented by counsel.

.....

The Legislature [in § 1250.410] did not direct the parties to “apprise” each other or “communicate” with each other about an offer or demand. (*City of San Leandro v. Highsmith, supra*, 123 Cal.App.3d 146, 155.) Rather it directed that each file with the court, and serve upon the other, a formal offer and demand, as an absolute prerequisite to an award of attorney’s fees. This procedure is not the equivalent of negotiations between the parties and consequently does not run afoul of section 1090.

(*Santa Clara Valley Water Dist. v. Gross, supra*, 200 Cal.App.3d at pp. 1369-1370.)

Absent these or similar special procedures, a board may not enter into settlement negotiations with a board member with whom it is in litigation. This office concluded in opinion 86 Ops.Cal.Atty.Gen. 142 (2003) that a settlement agreement resolving litigation, involving issuance of a development permit, between a district and one of its board members would violate section 1090.

When an employee, rather than a board member, is financially interested in a contract, the employee’s agency is prohibited from making the contract only if the employee was involved in the contract-making process. So long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee’s duties or because the employee has disqualified himself or herself from all such participation) the employee’s agency is not prohibited from contracting with the employee or the business entity in which the employee is interested.

In 80 Ops.Cal.Atty.Gen. 41 (1997), firefighters were permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity. In 63 Ops.Cal.Atty.Gen. 868 (1980), a real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal. (See Cal.Atty.Gen., Indexed Letter, No. IL 73-146 (August 29, 1973) [regarding state employee]; but see Pub. Contract Code, § 10410 [prohibiting contracts between state employees and state agencies]; see also Chapter VII of this pamphlet.)

E. PRESENCE OF REQUISITE FINANCIAL INTEREST

For section 1090 to apply, the public official in question must have a financial interest in the contract in question. Although the term “financial interest” is not specifically defined in the statute, an examination of case law and the statutory exceptions to the basic prohibition indicate that the term is to be liberally interpreted. In 85 Ops.Cal.Atty.Gen. 34 (2002), this office concluded that the definitions of the remote and noninterest exceptions should be consulted for guidance to determine what falls within the scope of the term “financial interests” as used in section 1090.

In *Thomson v. Call*, *supra*, 38 Cal.3d 633, 645, the court stated that the term financial interest included both direct and indirect interests in a contract. As an example of an indirect interest, the court cited *Moody v. Shuffleton* (1928) 203 Cal. 100, in which a county supervisor sold his business to his son in return for a promissory note secured by the business. Because the business helped to secure the value of the official’s mortgage, a conflict existed when county printing contracts were awarded to the son. The court also stated that an official who was a stockholder in a corporation had an indirect interest in the contracts of the corporation.

Although special statutory exemptions may negate the full effect of the section 1090 prohibition, the following economic relationships generally constitute a financial interest: employee of a contracting party; attorney, agent or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; officer or employee of a nonprofit corporation which is a contracting party.

Prior to 1963, section 1090 applied to all interests, not merely financial ones. However, since most reported cases prior to 1963 involved financial interests, these older cases still represent viable interpretations of the law. Even where these cases do not involve a financial interest, they are still instructive on the issue of whether there is a sufficient connection between the contract and the interest held by the official in order to bring the transaction under the coverage of the prohibition.

In *People v. Deysher* (1934) 2 Cal.2d 141, 146, the court stated that:

‘However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.’

(See also *People v. Honig*, *supra*, 48 Cal.App.4th at p. 315.)

The court went on to say that section 1090 attempted to prohibit any measure of duality in contractual situations because officials, as trustees of the public, may not exploit their public positions for private benefits. In *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565, 571, the court stated:

The legislation with which we are here concerned seeks to prohibit a situation wherein a man purports to deal at arm's length with himself and any construction which condones such activity is to be avoided.

In *People v. Gnass*, *supra*, 101 Cal.App.4th 1271, 1298, the court indicated that:

[T]he certainty of financial gain is not necessary to create a conflict of interest. '[T]he object of the [statute] is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision. . . .' (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569.) 'The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.' (*Honig*, *supra*, 48 Cal.App.4th at p. 325.)

In 86 Ops.Cal.Atty.Gen. 187 (2003), this office concluded that there was no "reach-back period" (such as the 12-month period for income under the Political Reform Act) within the context of section 1090. There the financial interest in question was that of a supplier of goods or services, but the discussion regarding the "termination" of the interest would appear to apply to an employer or other source of income as well. The opinion concluded that only during the pendency of the business relationship was there a financial interest from which the official might benefit directly or indirectly. However, if the business relationship were not terminated in a manner that removed "the possibility of any personal influence, either directly or indirectly" the prohibition of section 1090 would remain in effect.

Below is a discussion of several decisions and opinions in which the public officials in question have possessed the requisite financial interest.

Complex multi-party transaction -- In the 1985 California Supreme Court case of *Thomson v. Call*, *supra*, 38 Cal.3d 633, the court found that a complex multi-party transaction involving the sale of property from a city council member through an intermediary corporation to the city constituted a violation of section 1090. The corporate intermediary obtained the land to convey to the city for use as a park and the corporation was to be issued a use permit for construction of a high-rise building on adjacent property. If the corporation failed to obtain the council member's property, the corporation was to pay to the city a sum of money with which it could acquire the land through eminent domain. Had there been no discussions between the city and the corporation regarding the property to be acquired for the park prior to the corporation's acquisition of the council member's property, the section 1090 prohibition might not have been invoked. However, in *Thomson*, the court found that the purchase by the corporation of the council member's land was part of a pre-arranged

agreement with the city. Under these circumstances, the court concluded that the city council member was financially interested in the contract that conveyed the land to the city.

Shareholder insulated from contract payments -- In *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal.App.3d 201, the court concluded that a public official, who was a shareholder in an insurance brokerage firm, had a financial interest in the firm despite the creation of a financial arrangement which would assure that payments under an insurance contract with a county would not be used to pay the shareholder's compensation or the business expenses of the brokerage firm. The court concluded that the volume of business to the firm affected the value of the interested official's investment in the firm. Thus, to the extent that the firm benefitted by increased business, so did the official, despite the fact that the benefit was in some way indirect. (The court indicated that it did not have enough evidence to determine whether the interest was remote.)

In 84 Ops.Cal.Atty.Gen. 158 (2001), this office reached a similar conclusion. There, a city councilman owned 48 percent of the shares of an architectural corporation, with the remaining shares owned by three other licensed architects. The architectural corporation also leased its premises from the councilman. Under these circumstances, one of the other three architects may not establish a separate firm for the purpose of contracting with the city to provide architectural services utilizing the corporation's premises, employees, and equipment even if the corporation would bill the firm for its pro rata share of the rent, employees' services, and use of equipment, and the corporation would not share in the profits of the firm from the city's contracts. Under these circumstances, the opinion concluded that the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts and the corporation would likely benefit indirectly from the city's business.

In 86 Ops.Cal.Atty.Gen. 138 (2003), this office was asked whether it would violate section 1090 for a city council to enter into a contract with a law firm, of which a city council member is a partner, to represent the city in a lawsuit. Under the proposed agreement, the law firm would not receive any legal fees and would bear all litigation expenses normally borne by the client. The opinion pointed out that this arrangement could give rise to potentially significant costs to the firm. In these circumstances, the city's interests and the firm's interests might diverge. For example, the city might wish to litigate swiftly and aggressively, using the firm's best qualified senior attorneys and pursuing an elaborate discovery plan. The law firm, on the other hand, might wish to minimize its costs at the outset of the litigation and spread them over a longer period of time. Also, depending upon such factors as staff salaries, overhead, and the needs of its other clients, the law firm might prefer to assign fewer attorneys to the city's case and engage in less discovery. Depending upon initial court rulings, it might be in the interests of the law firm to enter into settlement negotiations which might not be in the best interests of the city.

The contract could also bring indirect economic gain to the law firm in that success in the litigation could be financially advantageous to the law firm and inure to the council-member's personal benefit by enhancing the value of his interest in the firm. Accordingly, the opinion concluded that the council member had a financial interest in the contract and that such an arrangement would violate section 1090.

Contingent payment -- In *People v. Vallerga, supra*, 67 Cal.App.3d 847, the court found that a county employee had a financial interest in a contract where his private consulting contract was contingent upon the execution of the county's contract with the city. The court found that the requisite financial interest existed where the contracting entity is in a position to render actual or potential pecuniary gain to the official by virtue of the award of the contract.

Primary shareholder in contracting party -- In *People v. Sobel, supra*, 40 Cal.App.3d 1046, section 1090 was applied to remedy a classic self-dealing situation. There, a city employee, involved in purchasing books, awarded contracts to a corporation in which, unknown to the city, he and his wife were the primary shareholders.

Creditor-debtor relationship -- In *People v. Watson* (1971) 15 Cal.App.3d 28, the court concluded that a creditor-debtor relationship constituted a financial interest within the meaning of section 1090. (See also *Moody v. Shuffleton, supra*, 203 Cal. 100.) The defendant was a harbor commissioner whose corporation had loaned money to a corporation which subsequently was attempting to negotiate a lease with the commission. While the loan was still outstanding, defendant voted as a commissioner to approve the proposed lease, thereby violating section 1090.

Spousal property -- An official also has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655.) In 78 Ops.Cal.Atty.Gen. 230 (1995), this office concluded that a city council member had a financial interest in a development agreement where the council member's spouse was a partner in a law firm that represented the contracting developer on matters unrelated to the contract. Since the spouse's property is attributed to the official, exemptions which would be applicable if the official possessed the interest directly are also attributed to the spouse's property. (See section I of this Chapter for a discussion of remote interests.)

In 85 Ops.Cal.Atty.Gen. 34 (2002), this office concluded that where a city proposed to enter into a development agreement with a developer, a senior staff member of the city may not participate in the negotiating and drafting of the development agreement where the staff member's spouse is employed by a consulting firm that provides outreach services to the developer on a yearly retainer even though the spouse has no ownership interest in the firm, he will not work on the city's project, and his income will not be affected by the outcome of the development agreement or project. The spouse of the city staff member was one of the people in the consulting firm that provided services to the developer. As a result, the spouse, and hence the public employee, was found to have a financial interest in the contract by virtue of being a supplier of services to the contracting party.

In 69 Ops.Cal.Atty.Gen. 255 (1986), this office discussed remote interest and the application of the exemption in section 1091.5(a)(6) to a school board member and a teacher who were married. (See 65 Ops.Cal.Atty.Gen. 305 (1982) [regarding an interested superintendent's participation in labor negotiations]; see also section J, subsection (6) of this chapter for further discussion.)

In 69 Ops.Cal.Atty.Gen. 102 (1986), this office discussed participation of a school board member in a collective bargaining agreement with the union which represented the member's spouse who was a tenured teacher.

In 75 Ops.Cal.Atty.Gen. 20 (1992), section 1090 was interpreted to prohibit a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. Just as a board may not employ a director's spouse without violating section 1090, neither may it pay the travel expenses of a director's spouse. The opinion further concluded that there was no direct and substantial public purpose to be served by paying the travel and incidental expenses of a director's spouse. Therefore, payment of such expenses would also represent an unconstitutional expenditure of public funds. (See also 84 Ops.Cal.Atty.Gen. 131, 132, fn. 2 (2001); 81 Ops.Cal.Atty.Gen. 169, 171-172 (1998).)

Public officers to receive commission -- In 66 Ops.Cal.Atty.Gen. 376 (1983), this office concluded that the terms of the compensation package for the city attorney and other city personnel made them financially interested in all land development contracts to which the city was a party. Compensation for these officials was tied to increases in land value, based on the approval of land developments. The opinion pointed out that in approving land developments, a number of policy issues, aside from land value, must be considered, e.g., the ratio between commercial and residential development, density factors, etc. In basing compensation solely on land values, there was an incentive to consider only land value factors.

Employee of contract provider -- In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that a local mental health director was in violation of section 1090 where he also was employed by the contract provider of mental health services to the county. In his official position, he was required to advise the county board of supervisors regarding contracts for mental health services, and in his private capacity he received a fixed yearly salary from the contract provider. Thus, he was interested in the county's contracts for mental health services in both his public and private capacities.

F. TEMPORAL RELATIONSHIP BETWEEN FINANCIAL INTERESTS AND THE CONTRACT

The essence of the 1090 prohibition is to prevent self-dealing in the making of public contracts. In determining whether self-dealing has occurred, the timing of events may be crucial. Factors such as the date that the official assumed or resigned from office, the date the contract was executed and the duration of the contract are important and may prove to be dispositive.

Thus, an official who has contracted in his or her private capacity with the government before the official is elected or appointed does not violate the section, and the official may continue in his or her position as such contracting party for the duration of that contract. The official's election or appointment does not void it. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops.Cal.Atty.Gen. 176 (2002); 84 Ops.Cal.Atty.Gen. 34 (2001).) However, when the

time comes for the contract to be extended, amended or renegotiated, the official faces a new set of problems.

In the case of a board member, the official must resign from office or eliminate the private interest to avoid the proscription of section 1090. (*City of Imperial Beach v. Bailey*, *supra*, 103 Cal.App.3d 191; *Finnegan v. Schrader*, *supra*, 91 Cal.App.4th 572; see also Cal.Atty.Gen., Indexed Letter, No. IL 92-407 (June 2, 1992); Cal.Atty.Gen., Indexed Letter, No. IL 75-170 (July 29, 1975).) A new contract between the board member and the city, county or district, which the board member represents, may not be executed. (But see Pub. Contract Code, §§ 10410, 10411 [regarding state employees discussed in Chapter VII of this pamphlet].)

However, simply resigning a public post may not cure a conflict in all situations. Timing is essential. In *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565, the court ruled that a public official may not resign from office at the last minute in order to take private advantage of a contract where the official had participated in the formation of the contract in his or her public capacity. In that case, a city council member owned a plumbing business which was awarded a plumbing subcontract in connection with construction of a city civic center. The official had taken part in the planning, preliminary discussions, compromises, drawing of plans and specifications, and solicitation of bids for the civic center project. The court held that this council member had participated in the “making” of the contract within the meaning of section 1090, even though the official resigned from office before the contract was finally awarded. (See *City Council v. McKinley*, *supra*, 80 Cal.App.3d 204; 66 Ops.Cal.Atty.Gen. 156 (1983); 81 Ops.Cal.Atty.Gen. 317 (1998); Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (January 26, 1993).)

Since board members are conclusively presumed to have made all contracts under their jurisdiction, it is possible that a court could conclude that a board member had, as a matter of law, participated in the making of any contract, the planning for which had been commenced during the board member’s time in office.

In the case of an employee, a contract may be renegotiated, so long as the employee totally disqualifies himself or herself from any participation, in his or her public capacity, in the making of the contract. When a contractor serves as a public official (e.g., a city attorney) renegotiates a contract, this office recommends that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility of a misunderstanding arising concerning whether the contractor’s statements were made in the performance of the contractor’s public duties or in the course of the contractual negotiations. However, in the absence of special circumstances, the fact that a contract city attorney’s advice to initiate or defend litigation would increase the amount of payments under an existing contract, generally would not violate section 1090.

G. EFFECT OF SPECIAL STATUTES

Some statutes may contain special provisions which alter or eliminate the general rule set forth in section 1090 in a specific situation. For example, Education Code section 35239

provides that governing board members of school districts with an average daily attendance of 70 or less may contract with their districts under specified circumstances.

For special rules concerning hospitals and health care districts, see Government Code section 37625 (municipal hospitals), Health and Safety Code section 1441.5 (county hospitals), and Health and Safety Code section 32111 (health care districts).

It should be noted that such special statutes may not take precedence over the Political Reform Act unless they are adopted in accordance with the procedures set forth in section 81013.

H. GENERALLY, A CONTRACT MADE IN VIOLATION OF SECTION 1090 IS VOID AND UNENFORCEABLE

In addition to the proscription against officials making contracts in which they have a financial interest, courts have held that a contract made in violation of section 1090 is void. Any payments made to the contracting party, under a contract made in violation of section 1090 must be returned and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits which it receives under the contract. (*Thomson v. Call, supra*, 38 Cal.3d at p. 650; *Finnegan v. Schrader, supra*, 91 Cal.App.4th 572.)

Section 1092 provides that every contract made in violation of section 1090 may be avoided by any party except the official with the conflict of interest. (See § 1092.5 for exception concerning good faith parties involved in the lease, sale or encumbrance of real property.)

Despite the wording of the section “may be avoided,” case law has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable. (*Thomson v. Call, supra*, 38 Cal.3d 633; *People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931.) However, in *Marin Healthcare District v. Sutter* (2002) 103 Cal.App.4th 861, the court refused to void a contract where the legal action challenging the contract did not come within an applicable statute of limitations. Thus, the *Marin* decision appears to have the effect of making such contracts voidable and not void from the inception. (The court failed to indicate which statute of limitations applies to section 1090 violations.) Courts often give public policy reasons for the holding that contracts made in violation of section 1090 are void (see *City of Oakland v. California Const. Co., supra*, 15 Cal.2d 573), and note the general rule that a contract made in violation of an express statutory provision is always void. (*Stockton P. & S. Co. v. Wheeler, supra*, 68 Cal.App. 592; *Smith v. Bach* (1920) 183 Cal. 259.) In *Stockton P. & S. Co., supra*, the court said, ““where a statute provides a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it.”” (*Id.*, at p. 601.)

A contract can be rendered void even if made without the participation of the official with the conflicting interest if he or she is a member of the contracting body. (§ 1092; *Thomson v. Call, supra*, 38 Cal.3d 633.) Contracts made in violation of section 1090 are unenforceable, and no recovery will be afforded the contracting party for services rendered under the contract. (*Thomson v. Call, supra*, 38 Cal.3d 633; *County of Shasta v. Moody*

(1928) 90 Cal.App. 519, 523-524.) In *County of Shasta, supra*, the court said, “[t]he contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels.” (*Id.*, at p. 523; see also *County of San Diego v. Cal. Water and Telephone Co.* (1947) 30 Cal.2d 817, 830.)

In addition to the contract being void under section 1092, section 1095 provides that payment of any warrant or other evidence of indebtedness against the state, city, or county which has been purchased, sold, received, or transferred contrary to section 1090 or section 1093 is specifically disallowed. Any claim to payment pursuant to a contract, made in violation of section 1090, is effectively rendered worthless by this section.

In *Thomson v. Call, supra*, 38 Cal.3d 633, the court stated:

Clearly, no recovery could be had for goods delivered or services rendered to the city or public agency pursuant to a contract violative of section 1090 or similar conflict-of-interest statutes. (*Moody v. Shuffleton, supra*, 203 Cal. 100; *Berka v. Woodward, supra*, 125 Cal. at pp. 121, 123-124; *Domingos v. Supervisors of Sacramento Co.* (1877) 51 Cal. 608; *Salada Beach etc. Dist. v. Anderson* (1942) 50 Cal.App.2d 306, 310 [123 P.2d 86]; *Miller v. City of Martinez, supra*, 28 Cal.App.2d at pp. 370-371; *Hobbs, Wall & Co. v. Moran, supra*, 109 Cal.App. at p. 320; *County of Shasta v. Moody, supra*, 90 Cal.App. at pp. 523-525.) Moreover, the city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract. (*Berka, supra*, at pp. 123-124; *Miller, supra*, at p. 370; *County of Shasta, supra*, at pp. 523-524.)

...

.....

Mitigating factors--such as Call's disclosure of his interest in the transaction, and the absence of fraud--cannot shield Call from liability. Moreover, the trial court's remedy--allowing the city to keep the land and imposing a money judgment against the Calls--is consistent with California law and with the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity.

(*Id.* at pp. 646-647, 650.)

In *Campagna v. City of Sanger, supra*, 42 Cal.App.4th 533, a city attorney was required to forfeit a finder's fee which he received in connection with a contract between the city and a private law firm.

In *Finnegan v. Schrader, supra*, 91 Cal.App.4th 572, 583, in which a member of a board applied for and was hired as the board's executive officer without first resigning, the court stated:

It is settled law that where a contract is made in violation of section 1090, the public entity involved is entitled to recover any compensation that it has paid under the contract without restoring any of the benefits it has received. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 646-647; see also Gov. Code, § 1092.) The contract is against the express prohibition of the law, and “. . . courts will not entertain any rights growing out of such a contract, or permit a recovery upon quantum meruit or quantum valebat.” (*Thompson v. Call*, *supra*, 38 Cal.3d at p. 647, quoting *County of Shasta v. Moody* (1928) 90 Cal. App. 519, 523-524 [265 P. 1032], italics omitted.) This principle applies without regard to the willfulness of the violation. ‘A person who violates section 1090, regardless of whether the violation is intentional, forfeits any rights or interests flowing from the illegal contract.’ (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 538 [49 Cal.Rptr.2d 676].)

(*Finnegan v. Schrader*, *supra*, 91 Cal.App.4th at p. 583.)

I. REMOTE INTERESTS OF MEMBERS OF BOARDS AND COMMISSIONS

1. The Exception And Its Operation

The remote interest exception applies only to members of multi-member bodies; it does not apply to individual decision makers or employees. When a board member has a remote interest, it means that the board member may disqualify himself or herself from any participation in the making of the contract and permit the remainder of the body to decide all issues involved in its making. If a member of a board has an interest that is not either a remote interest or a noninterest (see *post* section J of this chapter), the contract may not be made unless it is subject to the rule of necessity.

It is to be noted that “remote” always refers to the private interest an official has in the contract. The official’s public interest either exists or it does not. An official whose interest falls into one of the “remote interest” categories (see discussion below) must, however, (1) disclose the official’s interest to his or her agency, board, or body and (2) have it noted in the official records of that body. An official who intentionally fails to disclose the existence of a remote interest before action is taken on the contract in question would violate section 1090 and would be subject to criminal prosecution. (See discussion of sanctions, below.) However, such a violation would not void the contract unless the private contracting party knew of the official’s remote interest at the time of contracting. (§ 1091(d).)

When an official claims a remote interest, the board or agency may take action on the sale, purchase, or other contract involved if it acts in good faith and if the vote to authorize, approve, or ratify is sufficient without counting the vote or votes of those with remote interests. The provision that permits the action to be taken, without counting the interested official’s vote, has been interpreted by this office to require complete disqualification of the interested officials. (78 Ops.Cal.Atty.Gen. 230, 237-238 (1995); 67 Ops.Cal.Atty.Gen. 369, 377, fn. 8 (1984); 65 Ops.Cal.Atty.Gen. 305 (1982).) If an official with a remote interest in a contract fails to disqualify himself

or herself or if the official influences or attempts to influence a colleague's vote on the matter, the official may not enjoy the benefit of the remote interest exception. (§ 1091(c).)

The term "remote" has a special statutory meaning in the context of section 1090 et seq. It is a term of art having an assigned meaning that does not always square with its "common" meaning.

The remote interest exception is to be interpreted narrowly. (*Eldridge v. Sierra View Local Hospital District* (1990) 224 Cal.App.3d 311, 324.) We are to construe narrowly the exceptions to the prohibition of section 1090 so as not to extend their reach to situations the Legislature did not manifestly intend. (See *City of National City v. Fritz* (1949) 33 Cal.2d 635, 636; 81 Ops.Cal.Atty.Gen. 169, 174 (1998).)

2. Definition Of Remote Interests

"Remote interests" are carefully defined in the statutes. Set forth below is a brief description of the remote interest exceptions.

a. Officer or Employee of a Nonprofit Corporation

An officer or employee of a nonprofit corporation has only a remote interest in the contracts, purchases, and sales of that corporation. (§ 1091(b)(1).) This means that a board that includes a member who is an officer or employee of a nonprofit corporation may nevertheless enter into a contract with that nonprofit corporation so long as the interested member avoids all participation in the making of the contract and discloses his or her interest which is noted in the public entity's official records. (85 Ops.Cal.Atty.Gen. 176 (2002).) Such a contract might involve the provision of services or the making of a grant to the nonprofit. (85 Ops.Cal.Atty.Gen. 176, *supra*.)

By adopting this exception, the Legislature made it clear that corporate officers have a financial interest in their corporations even if the corporations are nonprofit. This exception indicates that an official can legally, under section 1090, have a financial interest even though the official does not have a personal interest in the contract. (See also § 1091.5(a)(8) concerning "noncompensated officers" of specified tax-exempt corporations.)

b. Employee or Agent of a Private Contracting Party

An employee or agent of a private contracting party may have only a remote interest in its contracts when (1) the private party has 10 or more other employees; (2) the official/employee has been an employee or agent of that party for at least three years; (3) the officer owns less than 3 percent of the shares of stock of the contracting party; (4) the employee or agent is not an officer or director of the contracting party and (5) the employee or agent did not directly participate in formulating the bid of the contracting party.

Some latitude is allowed in computing the three-year period, to permit an employee of a business, which has gone through a reorganization or some other metamorphosis, to count time employed before the change, as long as the “real or ultimate ownership of the contracting party” remains substantially unchanged. “Real or ultimate ownership” is further defined to include “stockholders, bondholders, partners, or other persons holding an interest. . .” (§ 1091(b)(2);

A person is an agent of the contracting party only if an agency relationship has been created authorizing the person to represent the principal in specified contexts. (See Civ. Code, § 2295; *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal.App.3d 201; 85 Ops.Cal.Atty.Gen. 176 (2002).)

c. Employees or Agents; Special Contracts

Section 1091(b)(3) provides that an official who is an employee or agent of a contracting party has a remote interest in the contract if all of the enumerated factors set forth in the subsection are present. (1) The official must be an officer in the local agency located in a county with a population of 4,000,000 or less; (2) The contract must be competitively bid [and not for personal services], and the contracting party must be the lowest bidder; (3) The official must not hold a primary management position with or ownership interest in the contracting party, and must not be an officer or director of the contracting party; (4) The official may not have directly participated in formulating the bid of the contracting party; and (5) The contracting party must have at least 10 other employees.

d. Parent

A parent has only a remote interest in the earnings of his or her minor child for personal services. (§ 1091(b)(4).)

e. Landlord or Tenant

A landlord or tenant of a contracting party has a remote interest in the contracts of that party. (§ 1091(b)(5).) Formerly, the landlord/tenant relationship had been held to create an interest within the meaning of section 1090. (*People v. Darby* (1952) 114 Cal.App.2d 412.)

f. Attorney, Stockbroker, Insurance or Real Estate Broker/Agent

Under specified conditions set forth in § 1091(b)(6), the remote interest exception may apply to:

- the attorney of a contracting party

- an owner, officer, employee, or agent of a firm which renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker.

The remote interest exception applies when the individual has a 10% or greater interest in the law practice, or firm, stock brokerage firm, insurance firm, or real estate firm but when the individual will receive no remuneration, consideration, or commission as a result of the contract.

Thus, if both of these conditions are present, a member of a board who is an attorney of a contracting party, or an agent/broker of a contracting party may disqualify himself or herself from participating in the making of the contract, and the remaining members of the board would be free to enter into the contract. (Attorneys and agent/brokers who have less than a 10-percent ownership interest in their firm and receive no compensation have a noninterest, see 1091.5(a)(10).)

In 78 Ops.Cal.Atty.Gen. 230 (1995), a city council member was found to have an interest in the client of a law firm in which his spouse was a partner. However, since the representation was on matters unrelated to the contract, the remote interest exception applied to the spouse's interest as attributed to the official. This opinion was issued prior to the addition of the 10-percent ownership provision in § 1091(b)(6).

g. Member of a Nonprofit Corporation Formed Under the Food and Agricultural Code or Corporations Code

A special designation of remote interest is given to a member of a nonprofit corporation formed under either the Food and Agricultural Code or Corporations Code for the sole purpose of selling agricultural products or supplying water. (§ 1091(b)(7).)

h. Supplier of Goods and Services

An official has only a remote interest in a party that seeks to contract with the official's government agency when the official has been a supplier of goods or services to the contracting party for at least five years prior to the official's election or appointment to office. (§ 1091(b)(8); 86 Ops.Cal.Atty.Gen. 118 (2003).) In 85 Ops.Cal.Atty.Gen. 176 (2002), this office opined on a situation in which a council member had provided services in connection with a single project for more than five years, but for less than five years with the current contracting party. The opinion of this office concluded that the five-year requirement for this exemption may not be met by totaling the time the council member has provided subcontracting services on the project; rather, the official must have provided goods or services to the contracting party in question for the requisite period of time. (See *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal.App.3d at pp. 217-218.)

In 86 Ops.Cal.Atty.Gen. 187 (2003), this office concluded that the five-year period ran from the board member's most recent term, as opposed to the initial term. Thus, a board could enter into an agreement with a business firm that purchases goods and services from a board member who has been a supplier of goods and services to the firm for at least five years prior to the commencement of his current term of office so long as the board member properly disqualified himself or herself from all aspects of the contract-making process.

i. Party to a Land Conservation Contract

An official who enters into a contract or agreement under the California Land Conservation Act of 1965 (The Williamson Act) is deemed to have only a remote interest in that contract for the purposes of section 1090. (§ 1091(b)(9).) This allows land-owning supervisors to enter into such contracts with their own counties in accordance with the purpose of the Land Conservation Act. But note Cal.Atty.Gen., Indexed Letter, No. IL 73-197 (November 9, 1973) (in which this office advised that county supervisors who had previously made land conservation contracts were ineligible to vote on a motion to abolish future use of the Land Conservation Act in their county because of the common law prohibition against conflict of interest).

j. Director or 10-percent Owner of Bank or Savings and Loan

An official who is a director, or holds a 10-percent ownership interest or greater in a bank or savings and loan has only a remote interest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091(b)(10).) (For officers, employees and persons holding less than a 10-percent ownership interest, see 1091.5(a)(11); for competitively bid banking contracts, see 1091.5(b).)

It should be noted here that a private loan can, however, create an interest which is not remote. In *People v. Watson, supra*, 15 Cal.App.3d 28, the court determined that a loan by a corporation, controlled by a public official, to another corporation created a financial interest for the official in the contract activities of the second corporation.

k. Employee of a Consulting, Engineering, or Architectural Firm

An engineer, geologist, or architect has a remote interest in a consulting, engineering, or architectural firm so long as he or she does not serve as an officer, director, or in a primary management capacity. (§ 1091(b)(11).)

l. Housing Assistance Contracts

Subsection (b)(12) of section 1091 provides a limited exception from the 1090 prohibition in connection with housing assistance contracts. This

exception provides that an elected officer has a remote interest in a housing assistance contract, which is entered into pursuant to section 8 of the United States Housing Act of 1937, provided that the officer was elected after November 1, 1986, and the contract was in existence prior to the officer's assumption of office. The exemption for housing assistance contracts extends only to the renewal or extension of an existing tenant's contract or to new tenants, where the unit was previously under a housing assistance contract and the rental vacancy rate for the jurisdiction is less than five percent.

m. Salary or Payments from Another Government Entity

When a member of a board is receiving salary, per diem, or reimbursement for expenses from another government entity, the board member has a remote interest in the contracts of that other government entity. When the contract does not involve the department that employs the board member, the board member has a noninterest pursuant to section 1091.5(a)(9). (See section J, subsection 9 of this chapter.)

In 83 Ops.Cal.Atty.Gen. 246 (2000), this office concluded that a city council, one member of which is a deputy sheriff, may enter into a contract with the sheriff to provide police services to the city, so long as the deputy sheriff discloses the interest to the city council which is noted in its official records and the deputy sheriff completely abstains from any participation in the matter.

This exception cannot be used to permit a member of a board to enter into a contract with his or her own board.

n. Shares of a Corporation When the Shares Were Derived from Employment

When a person owns less than 3 percent of the shares of a contracting party that is a for-profit corporation, he or she has a remote interest in the corporation provided that the ownership of the shares derived from the person's employment with that corporation. (§1091, subd. (b)(14), as amended by Stats. 2003, ch. 701, effective January 1, 2004.)

J. NONINTERESTS

Section 1091.5 delineates situations which might technically create a conflict of interest under section 1090, but which the Legislature has decided as a matter of policy are exempt from its operation. Unlike the "remote interest" exception, noninterest do not require abstention or, except in very limited circumstances, disclosure.

However, it must be remembered that an interest which is a noninterest under section 1091.5 might still create an interest for an official under the terms of the Political Reform Act. That

Act's provisions must be consulted before proceeding with any transaction in which an official may have a conflict of interest since, by its own terms, it supersedes other conflict-of-interest legislation where inconsistencies exist. (§ 81013.)

The interests which fall into the section 1091.5 exception are as follows:

1. Corporate Ownership And Income

An official has a noninterest in a business corporation, in which he or she owns less than three percent of its shares, as long as the official's total annual income from dividends and stock dividends from the corporation amounts to less than five percent of his or her total annual income and any other income he or she receives from the corporation also amounts to less than five percent of his or her total annual income. In other words, it is a three-part test, and the official who fails any of the three parts cannot qualify for the noninterest exemption with regard to that corporation. (§ 1091.5(a)(1).)

2. Reimbursement Of Expenses

An official has a noninterest in reimbursement for his or her actual and necessary expenses incurred in the performance of his or her official duties. (§ 1091.5(a)(2).) However, this exception does not include the expenses of an official's spouse. (75 Ops.Cal.Atty.Gen. 20 (1992).)

3. Public Services

An official has a noninterest in the receipt of public services provided by his or her agency or board as long as he or she receives them in the same manner as if he or she were not a public official. (§ 1091.5(a)(3).)

In 81 Ops.Cal.Atty.Gen. 317 (1998), this office analyzed whether a city-established small business loan program was the type of public service exempted by section 1091.5(a)(3). Our opinion concluded that section 1091.5(a)(3) applies to "public utilities such as water, gas, and electricity, and the renting of hangar space in a municipal airport on a first come, first served basis. The furnishing of such public services would not involve the exercise of judgment or discretion by public agency officials. Rather, the rates and charges for the services would be previously established and administered uniformly to all members of the public. (See 80 Ops.Cal.Atty.Gen. 335, 338 (1997).)" (*Id.* at p. 320.) The opinion concluded that obtaining a government loan was not a public service within the meaning of the exemption in subdivision (a)(3) because it involved the exercise of discretion to determine the recipient of the service.

4. Landlords And Tenants Of Governments

Public officials who are landlords or tenants of the local, state, or federal government or any arm thereof, have a noninterest in the government entities contracts unless the

subject matter of the contract is the very land for which the official is either the landlord or tenant. In the latter case, the official has a remote interest rather than a noninterest, and is subject to the provisions of section 1091. (§ 1091.5(a)(4).)

5. Public Housing Tenants

A tenant in public housing, created pursuant to the provisions of the Health and Safety Code, has a noninterest in agreements regarding that housing if he or she is serving as a member of the board of commissioners overseeing it. This provision was passed in response to the situation illustrated in Cal.Atty.Gen., Indexed Letter, No. IL 70-64 (April 3, 1970) (in which a public housing tenant who was also a member of the Housing Authority Commission was advised he or she would have a remote interest in most of the regulatory activities of the commission and would have to abstain from participating in many decisions pursuant to section 1091, thus making his or her appointment almost a nullity). The subsequent passage of this subsection shows clear legislative intent that public housing tenants are to be allowed to serve as housing authority commissioners. The exemption was extended further in 1975 to a tenant serving on a community development commission. (§ 1091.5(a)(5).)

6. Spouses

A noninterest exists when both spouses in a family are public officials. One spouse has a noninterest in the other's office holding if it has existed for at least one year prior to his or her election or appointment to office. (§ 1091.5(a)(6).)

In *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, the court narrowly construed the exception to mean that one spouse could retain his or her employment even though the other spouse was a member of a board that participated in the employment contract so long as the terms of the employment did not change. Thus, there could be no promotion or similar change in status.

Pursuant to section 1091.5(a)(6), this office concluded in 69 Ops.Cal.Atty.Gen. 255, *supra*, that the spouse of a school board member could have his or her teaching contract annually renewed so long as the spouse was not promoted or appointed to a new position.

The board of trustees of a community college district may not approve a selective reclassification of a classified employee's position if the employee's spouse is a member of the board of trustees and the reclassification makes the employee eligible for an increase in salary. (84 Ops.Cal.Atty.Gen. 175 (2001).) Similarly, the spouse of a member of a school board may not be hired by the district, whether as a substitute teacher or in any other employment capacity. (80 Ops.Cal.Atty.Gen. 320 (1997).)

In 69 Ops.Cal.Atty.Gen. 102, *supra*, this office concluded that the "rule of necessity" permitted a school district to contract on an annual basis with a tenured teacher who was the spouse of a member of the school district board, until the board member

could qualify for an exemption under section 1091.5(a)(6). Pending qualification, this office concluded that the board member was prohibited from participating in the collective bargaining agreement. The “rule of necessity” might not have been applicable had the spouse not been a tenured teacher who, barring special circumstances, was required to be offered a new contract annually.

In 65 Ops.Cal.Atty.Gen. 305, *supra*, this office reached a similar conclusion with respect to a superintendent who was interested in his or her spouse’s school employment. However, because the superintendent is an individual officer rather than a member of a board, the rule of necessity permits both the making of the contract and the superintendent’s participation in its making.

7. Unsalaried Members Of Nonprofit Corporations

A noninterest exists when a public official is a nonsalaried member of a nonprofit corporation provided the official’s interest is disclosed to the body or board at the time the contract is first considered and is noted in its official records. (§ 1091.5(a)(7).)

Although there are no cases or opinions concerning application of this section, this office believes that the reference to “members” refers to persons who constitute the membership of an organization rather than to persons who serve as members of the board of directors of such organizations. (See Legislative History, Stats. 1977, ch. 706 (Sen. Bill No. 711).) For the exception to apply, the person, who is a member of the organization, may not simultaneously hold a salaried position with the organization.

(See §§ 1091(b)(1) and 1091.5(a)(8) concerning “officers” as opposed to “unsalaried members” of nonprofit corporations.)

8. Noncompensated Officers Of Tax Exempt Corporations

A noninterest exists when a public official is a noncompensated officer of a nonprofit, tax-exempt corporation which, as a primary purpose, supports the functions of a public body or board, or to which the public body has a legal obligation to give particular consideration. Such interest, if any, must be noted in the official records of the public body. An officer is noncompensated even though he or she receives reimbursement for travel or other actual expenses incurred in performing the duties of his or her office. (§ 1091.5(a)(8).) For example, a nonprofit symphony association may be organized to support the publicly operated symphony hall and symphony orchestra.

(Compare with § 1091(b)(1) concerning “officers of nonprofit corporations” and § 1091.5(a)(7) concerning “unsalaried members of nonprofit corporations.”)

9. Contracts Between Government Agencies

Subdivision (a)(9) of section 1091.5 deals expressly with contracts between two public agencies. It provides that an officer or employee of one government agency is not interested in the contracts of the other government agency unless the contract directly involves the department that provides the salary, per diem or reimbursement to the officer or employee in question. The interest must be disclosed to the board when the contract is considered, and the interest must be noted in its official record.

In 85 Ops.Cal.Atty.Gen. 115 (2002), this office evaluated whether a deputy county counsel, who was elected to a city council, could participate in negotiations on a contract with the county to provide law enforcement services to the city. This office concluded that the city council member was covered by the noninterest exception of section 1091.5(a)(9) because the contract between the city and the county did not involve a contract with the County Counsel's Office (i.e. the department that employed the council member).

If the contract had involved the department that employed the council member, the official would have had a remote interest in the contract of the employer pursuant to section 1091(b)(13).

10. Attorney, Stockbroker, Insurance Or Real Estate Broker/Agent

Under specified conditions set forth in section 1091.5(a)(10), the noninterest exception may apply to:

- the attorney of a contracting party
- an owner, officer, employee, or agent of a firm which renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker.

For the noninterest exception to apply, two conditions must be present. First, these individuals may not receive any remuneration, consideration, or a commission as a result of the contract. Second, these individuals must have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

If both of these conditions are present, a member of a board who is an attorney of a contracting party, or an agent/broker of a contracting party may participate in the making of the contract. (For attorneys and agent/brokers who have more than a 10-percent ownership interest in their firm, see § 1091(b)(6).)

11. Officers, Employees And Owners Of Less Than 10 Percent Of A Bank Or Savings And Loan

A government official who also is an officer or employee, or who owns less than 10 percent of a bank or savings and loan, has a noninterest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091.5(a)(11).) A narrower exemption relating only to competitively bid contracts is set forth in section 1091.5(b), and appears to be subsumed within the exemption added to section 1091.5 in subdivision (a)(11). (For directors or persons holding more than a 10-percent ownership interest, see § 1091(b)(10).)

12. Nonprofit Organization Supporting Public Resources

An officer, director, or employee has a noninterest in the contracts of a nonprofit, tax-exempt corporation where the corporation has as one of its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, and where the officer, director or employee is acting on behalf of the corporation pursuant to an agreement between the corporation and a public agency to provide services related to such resources.

K. SPECIAL EXEMPTION FOR SUBDIVISION OF LAND; LOCAL WORKFORCE INVESTMENT BOARDS; COUNTY CHILDREN AND FAMILIES COMMISSION

1. Subdivision Of Land Permitted

Section 1091.1 provides a special exemption from the prohibition of section 1090 for public officials who must deal with state and local government entities regarding subdivision of land which they own. This section provides that such an official may subdivide lands which he or she owns, or has an interest in, without violating section 1090. He or she must, however, fully disclose the nature of his or her interest in such lands to the body which has jurisdiction over his or her subdivision (§ 1091.1(a)), and abstain from voting on any matter concerning it (§ 1091.1(b)).

The Subdivision Map Act allows a county to require subdividers to make certain public improvements to benefit future development. When such improvements are mandated, the law also requires that the owner be reimbursed for the costs of the improvements designed to benefit others. In 81 Ops.Cal.Atty.Gen. 373 (1998), this office concluded that the exception in section 1091.1 could be used to accomplish the reimbursement.

2. Local Workforce Investment Boards

Section 1091.2 provides that section 1090 does not apply to any contract or grant made by local workforce investment boards established pursuant to the federal Workforce Investment Act of 1998, unless both of the following conditions are met:

- a. The contract or grant directly bears on services to be provided by any member of a local workforce investment board or the entity the member represents, or financially benefits the member or the entity which the member represents.
- b. The member fails to recuse himself or herself from making, participating in making, or any way attempting to use his or her official position to influence a decision on the grant or grants.

3. County Children and Families Commission

Section 1091.2 provides that section 1090 does not apply to any contract or grant made by a county children and families commission established pursuant to the California Children and Families Act of 1998, unless both of the following conditions are met:

- a. The contract or grant directly bears on services to be provided by any member of a county children and families commission or the entity the member represents, or financially benefits the member or the entity which the member represents.
- b. The member fails to recuse himself or herself from making, participating in making, or any way attempting to use his or her official position to influence a decision on the grant or grants.

L. LIMITED RULE OF NECESSITY

This office and the courts have applied a limited rule of necessity to the application of section 1090. In 69 Ops.Cal.Atty.Gen. 102, 109, *supra*, this office described the rule of necessity as follows:

‘With respect to a contractual conflict of interest the “rule of necessity” may be said to have two facets. The first, . . . to permit a governmental agency to acquire an essential supply or service despite a conflict of interest. The contracting officer, or a public board upon which he serves, would be the sole source of supply of such essential supply or service, and also would be the only official or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest. [Citation.] The second facet of the doctrine, . . . [citation] arises in nonprocurement situations and permits a public officer to carry out the essential duties of his office despite a conflict of interest where he is the only one who may legally act. It ensures that essential governmental functions are performed even where a conflict of interest exists.’

The first facet of the rule of necessity concerns situations where a board must contract for essential services and no source other than that which triggers the conflict is available. In 4 Ops.Cal.Atty.Gen. 264 (1944), a city was advised that it could obtain nighttime service from a service station owned by a member of the city council, where the town was isolated

and his station was the only one open. This office cautioned that “[a]n event that can be reasonably anticipated, such as the repeated failure of a battery or the necessity for periodic service, would not be considered an emergency” so as to give rise to the rule of necessity. Other arrangements would be required in such cases. (But see Gov. Code, § 29708 [which flatly prohibits a county officer or employee from presenting a claim to the county for other than his or her official salary].)

The second facet of the rule of necessity focuses on the performance of official duties rather than upon the procurement of goods and services. In 69 Ops.Cal.Atty.Gen. 102, *supra*, this office applied the rule of necessity to permit a school board to enter into a memorandum of understanding with a teachers’ association despite the fact that a member of the school district board was married to a tenured teacher. A similar conclusion was reached in 65 Ops.Cal.Atty.Gen. 305, *supra*, where this office concluded that the Superintendent of Education could enter into a memorandum of understanding with school employees, despite the fact that he was married to a permanent civil service school employee. Both opinions concluded that the labor agreements with the teachers’ association were necessary and that there was nothing in the history of section 1090 that suggested a person should be required to resign his or her employment because of marital status. Accordingly, to the extent that the noninterest exception for public official spouses set forth in section 1091.5(a)(6) was not applicable, this office advised that the rule of necessity would permit issuance of a memorandum of understanding.

When the rule of necessity is applied to a member of a multi-member board, as opposed to a single official or employee, this office has concluded that the board member must abstain from any participation in the decision. In other words, the effect of the rule of necessity is to permit the board with an interested member to nevertheless make a contract, but the board member is still prohibited from participating in its making. In the case of a single official or employee, application of the rule of necessity permits the official or employee to participate in the making of the contract. (69 Ops.Cal.Atty.Gen. 102, *supra*, at p. 112 [school board trustee abstention]; 67 Ops.Cal.Atty.Gen. 369, *supra*, at p. 378 [board member abstention]; 65 Ops.Cal.Atty.Gen. 305, *supra*, at p. 310 [superintendent of schools permitted to participate].)

M. PENALTIES FOR VIOLATION BY OFFICIALS

A willful violation of any of the provisions of section 1090 et seq., is punishable by a fine of not more than \$1,000 or imprisonment in state prison. (§ 1097.) For an official to act “willfully,” his or her actions concerning the contract must be purposeful and with knowledge of his or her financial interest in the contract. (*People v. Honig*, *supra*, 48 Cal.App.4th at pp. 334-339.) The statute of limitations for section 1090 prosecutions is three years after discovery of the violation. (*Id.*, at p. 304, fn. 1; Penal Code, §§ 801, 803, subd. (c).) Additionally, such an individual is forever disqualified from holding any office in this state. (§ 1097.) When a state or local government agency is informed by affidavit that a board member or employee has violated section 1090, the agency may withhold payment of funds under the contract pending adjudication of the violation. (§ 1096.)

One example of a conviction under section 1097 is *People v. Sobel, supra*, 40 Cal.App.3d 1046. In that case, a deputy purchasing agent for a county had a financial interest in a book seller that sold books to the county pursuant to contracts made by that agent. His conviction was based on the prosecution having established that he had the opportunity to and did influence execution of purchase contracts, directly or indirectly, to promote his personal interests.

For a discussion of other consequences which may result from a violation of section 1090, see section H (contract made in violation of § 1090 is void and unenforceable) of this chapter.

VII.

CONFLICT-OF-INTEREST LIMITATIONS ON STATE CONTRACTS

California Public Contract Code Sections 10365.5 and 10410-10430*

A. OVERVIEW

Sections 10410 and 10411⁷ of the California Public Contract Code provide a two-level approach to potential conflict-of-interest situations in connection with the making of state contracts. Section 10410 concerns potential conflicts by persons currently holding office and section 10411 concerns potential conflicts by those who have left state service. The prohibitions do not apply to unsalaried members of part-time boards and commissions who receive payments only in connection with preparing for meetings and per diem for travel and accommodations. (§ 10430(e).) The code also expressly exempts the Board of Regents for the University of California from its coverage. (§ 10430(a).)

Other specific exemptions are contained in section 10430(b)-(g). They include contracts for architectural land engineering services, specified contracts exempt by section 10295, and contracts by spouses of state officers or employees and their employers for the provision of services to regional centers for persons with developmental disabilities pursuant to section 4648 of the Welfare and Institutions Code. With these exceptions, sections 10410 and 10411 generally cover all appointed officials, officers and civil service employees of state government.

Section 10365.5 contains a specific prohibition applicable to consultants involving “follow-on contracts.” These provisions of the Public Contract Code form a helpful adjunct to the provisions of Government Code section 1090 which also concern conflicts of interest in the contract-making process.

B. THE BASIC PROHIBITION REGARDING CURRENT STATE OFFICERS AND EMPLOYEES

Reduced to its essentials, section 10410 provides that: (1) no state officer or employee (2) shall engage in any employment, activity or enterprise (3) from which the officer or employee receives compensation, or in which he or she has a financial interest and (4) which is sponsored or funded, in whole or in part, by any state agency or department through a contract. An exception is provided if the employment or enterprise is required as a condition of the individual’s regular state employment. In addition to the general prohibition, section

*Selected statutory materials appear in appendix H (at p. 174).

⁷All section references in this chapter hereafter refer to the California Public Contract Code unless otherwise specified.

10410 specifically prohibits any covered official from contracting on his or her own behalf with a state agency as an independent contractor to provide goods or services.

The prohibition contained in section 10410 does not appear to be a transactional disqualification provision such as that contained in the Political Reform Act. Rather, it is a prohibition against state employees having specified financial interests. In the case of section 10410, the statute prohibits an individual from engaging in certain activities which are supported, in whole or in part, by a state contract. By prohibiting the “activity,” the statute in effect prohibits the making of state contracts in which the individual has the specified interest. Thus, in many instances, the provisions of section 10410 will be duplicative of the provisions of Government Code section 1090. However, the provisions of section 10410 apply only to state contracts and are different than the restrictions contained in Government Code section 1090 in certain respects.

In 84 Ops.Cal.Atty.Gen. 131 (2001), this office concluded that the prohibitions set forth in section 10410 did not generally apply to the spouse of a state officer or employee. The spouse of a state employee may, therefore, contract to provide goods or services to the employee’s department if the employee neither participates in the department’s decision to enter into the contract nor engages in the spouse’s business.

With respect to the prohibition against state officers or employees contracting on their own behalf as independent contractors, to provide goods or services, this office has orally advised that state employees who prepare educational film, video and printed materials as a part of their state employment cannot contract with another department as independent contractors to provide similar services in their off-hours.

C. THE BASIC PROHIBITION REGARDING FORMER STATE OFFICERS AND EMPLOYEES

Section 10411 regarding former state officials is divided into two parts. Subsection (a) involves a two-year prohibition against participating in a contract with which the official was involved during his or her state service. Subsection (b) involves a one-year prohibition of any contract by former policy making officials with their prior agencies.

Section 10411(a) provides that no retired, dismissed, separated or formerly employed state officer or employee may enter into a state contract in which he or she participated in any of the negotiations, transactions, planning, arrangements or any part of the decision-making process while employed in any capacity by an agency or department of state government. The statute does, however, place a two-year limit on the application of this statutory prohibition commencing on the date the person left state employment. For application of similar provisions under Government Code section 1090, see *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565 and 66 Ops.Cal.Atty.Gen. 156 (1983).

Section 10411(b) establishes a 12-month moratorium on any former state officer or employee, entering into a contract with his or her former agency, if the covered official held a policymaking position with the agency in the same general subject area as the proposed

contract within 12 months prior to his or her departure from state government. The statute expressly exempts contracts for expert witnesses in civil cases and contracts for the continued services of an attorney regarding matters with which the attorney was involved prior to departing state service.

D. LIMITATIONS ON CONSULTANTS

Section 10365.5 specifically applies to “consultants” as that term is defined in section 10335.5. With certain exceptions, section 10365.5 provides that no person or firm that has been awarded a consulting services contract may be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. In other words, a contractor may not be hired to conduct a feasibility study or produce a plan, and then be awarded a contract to perform the recommended services. The prohibition does not apply to architectural contracts covered by Government Code section 4525, nor to specified subcontractors having less than 10 percent of the consulting contract. (§ 10365.5(b) and (c).)

E. PENALTIES AND ENFORCEMENT

Section 10420 provides that any contract made in violation of these prohibitions is void unless the violation is technical and non-substantive. Section 10421 provides the state or any person acting on behalf of the state, the right to bring a civil suit in superior court to have the performance of a contract temporarily restrained and ultimately declared void. Successful plaintiffs may be awarded costs and attorney’s fees but the statute specifically provides that defendants may not receive either. Section 10425 provides that willful violation of the prohibitions is a misdemeanor and sections 10422 and 10423 provide felony penalties for persons involved in the corrupt performance of contracts.

VIII.

THE CONSTITUTIONAL PROHIBITION ON THE ACCEPTANCE OF PASSES OR DISCOUNTS FROM TRANSPORTATION COMPANIES

Cal. Const., Art. XII, § 7

A. OVERVIEW

The prohibition on the acceptance of passes or discounts from transportation companies by public officers was originally contained in article XII, section 19, of the California Constitution. In 1970, the Constitutional Revision Commission proposed that the provision be repealed. However, the proposal to eliminate this provision was defeated by the electorate. In 1974, the prohibition was moved from section 19 to section 7 of article XII. The genesis of the prohibition is in the historical relationship between the railroads and the state government in California.

In 67 Ops.Cal.Atty.Gen. 81 (1984), this office indicated that the origins of the prohibition were in the corruptive influences which might be brought about by gifts of free transportation to public officials. The opinion provided:

Article XII, section 7 (formerly § 19), was adopted to control the perceived corruptive influences of the railroads upon the legislative process. (See Debates and Proceedings of the Constitutional Convention, p. 379; John K. McNulty, Background Study -- California Constitution Article XII, Corporations and Public Utilities (1966) p. 100.) . . . It is apparent that the perceived corruptive influence consisted of the granting of special benefits in exchange for legislative favor. Thus, explicitly or implicitly, legislation favorable to the railroads was the *quid pro quo*. . . .

(*Id.* at pp. 83-84.)

In a 1982 quo warranto authorization letter, regarding Santa Monica, this office stated:

It appears that the intention of the framers of what is now article XII, section 7 was to inhibit and if possible preclude the undue influence of railroads and other transportation companies over legislators and public officials.

(*In re Knickerbocker*, February 1982.)

For a discussion of quo warranto procedure, see Section F of this chapter.

B. THE BASIC PROHIBITION

The constitutional prohibition on the acceptance of passes or discounts from transportation companies by public officials currently is contained in article XII, section 7 of the California Constitution. It provides:

A transportation company may not grant free passes or discounts to anyone holding an office in this State; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.

(Cal. Const., art. XII, § 7.)

Reduced to its component parts, this office has interpreted the prohibition to apply in the following manner:

- (1) The prohibition applies to public officers, both elected and nonelected but does not apply to employees.
- (2) The prohibition applies to interstate and foreign carriers, as well as domestic carriers, and to transportation received outside of California.
- (3) The prohibition applies irrespective of whether the pass or discount was provided in connection with personal or public business.
- (4) Violation of the prohibition is punishable by forfeiture of office and a quo warranto proceeding is the appropriate way to enforce the remedy.

(See, Code Civ. Proc., § 803.)

C. PERSONS COVERED

The prohibition specifically provides that it applies to “public officers.” In 3 Ops.Cal.Atty.Gen. 318 (1944), this office reiterated its interpretation that the prohibition applied only to officers and not employees. “As to the question of passes, it has always been the opinion of this office that the Constitutional prohibition does not operate to include ‘employees’ . . .” (*Id.* at p. 319.) Accordingly, the prohibition did not bar a state employee from receiving gifts of free transportation from a transportation company in connection with part-time private employment.

It is generally said that an “office” requires the vesting in an individual of a portion of the sovereign powers of the state. (See *Parker v. Riley* (1941) 18 Cal.2d 83, 87.) This office has provided informal advice as to the distinction between an officer and an employee. (Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (1975).) There, we stated that if a particular

individual actually sets or makes policy, he is an officer, if he merely advises policy makers, he is probably not an officer.

Cal. Atty.Gen., Indexed Letter, No. IL 75-294, *supra*, addressed the issue of whether officers and employees of the Division of Tourism could accept free airline transportation in the course of their duties. In that letter, this office concluded that the constitutional prohibition applied only to the officers but not the employees. The letter stated:

If a particular individual actually sets or makes policy, he is an officer, if he merely advises policy makers, he is probably not an officer. (See *Parker v. Riley*, 18 Cal.2d 83, 87 (1941); 42 Ops.Cal.Atty.Gen. 93, 95 (1963); 56 Ops.Cal.Atty.Gen. 556 (1973).

In *Parker v. Riley*, *supra*, the court said:

Thus, it is generally said that an office or trust requires the vesting in an individual of a portion of the sovereign powers of the state. (*Patton v. Board of Health*, *supra*, pp. 394, 398; *Curtin v. State*, *supra*, p. 390; *Leymel v. Johnson*, 105 Cal.App. 694, 699 [288 Pac. 858]; *Couts v. County of San Diego*, 139 Cal.App. 706, 712 [34 Pac. (2d) 812]; *State ex rel. Barney v. Hawkins*, *supra*, p. 520; *State ex rel. Kendall v. Cole*, *supra*; 53 A.L.R. 595, 602.) The positions here created do not measure up to so high a standard. They involve merely the interchange of information, the assembling of data, and the formulation of proposals to be placed before the Legislature. Such tasks do not require the exercise of a part of the sovereign power of the state.

(*Id.* at p. 87.)

Government Code section 1001 includes in the definition of civil executive officers “. . . the head of each department and all chiefs of divisions, deputies and secretaries of a department. . . .”

In Cal.Atty.Gen., Indexed Letter, No. IL 70-155 (August 7, 1970), this office concluded that the executive director of a redevelopment agency was a public officer within the meaning of the constitutional prohibition. This office specifically concluded that the prohibition applied to any officer, not just those who succeeded to office through the electoral process. The letter also reiterated that the constitutional prohibition did not apply to employees as contrasted with officers. (Cal.Atty.Gen., Indexed Letter, No. IL 71-159 (August 24, 1971) [provides additional discussion of these principles and is based on the same factual situation].)

Cal.Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964) concluded that the prohibition, at least in some circumstances, did not apply to the families of public officers. Thus, where the spouse of a covered official legitimately earns or receives a free pass or discount on travel from a transportation company, the acceptance of such a pass or discount would not be attributed to the officer. However, this conclusion might be different if the circumstances

surrounding the pass or discount suggested that it was provided in order to curry favor or extend a benefit to the officer.

In 67 Ops.Cal.Atty.Gen. 81 (1984), this office analyzed a situation involving application of the prohibition to a state legislator. Under the unique facts of that case, the opinion concluded that the legislator was not covered by the prohibition. There, the member of the Legislature was the spouse of a flight attendant. As a part of the flight attendant's employment package all spouses were offered specified free airline trips. The opinion concluded that a state legislator was a public officer for the purposes of the section and that the airline company in question was a transportation company within the meaning of the prohibition. However, the free transportation was offered to the legislator as a member of a larger group under a generally authorized or approved plan.

If, as we assume in the absence of contrary advisement or indication, the sole condition for the receipt of the propounded benefit is the spousal relationship, then the element of corruptive influence appears to be lacking, and the application of the constitutional prohibition would fail to serve its intended objective.

Accordingly, it is concluded that the acceptance by a member of the California Legislature who is the spouse of a flight attendant of a free or discounted air travel pass is not prohibited by article XII, section 7, of the California Constitution where such passes are offered on the same conditions to spouses of all flight attendants.

(67 Ops.Cal.Atty.Gen. 81, 84, *supra*.)

In 74 Ops.Cal.Atty.Gen. 26 (1991), this office indicated that a free upgrade from coach class to first class constituted a "discount" within the meaning of the constitutional prohibition. However, under those facts the receipt of the discount did not violate the prohibition because the officer received the tickets in his capacity as a member of a group unrelated to his official status. The official, who was on his honeymoon, received the free upgrade pursuant to the airline's policy of providing free first-class upgrades to all honeymooning couples.

These situations are distinguishable from the circumstances described in 76 Ops.Cal.Atty.Gen. 1 (1993) in which a mayor received a free first-class airline upgrade as a part of a promotion designed to bestow such upgrades on high profile, prominent individuals in the community. The opinion concluded that the mayor received the free first-class upgrade as a result of his status as mayor and not as a result of his participation in some larger group unrelated to his official status. (*Id.* at p. 4.) The opinion also concluded that the official need not be aware of the prohibition against the receipt of free transportation in order to violate it. (*Id.* at pp. 2-3.)

Thus, if the pass or discount is provided to the official because of his or her position as a government official, the prohibition applies. If, on the other hand, the pass or discount is provided to the official as a member of a larger group, that is not related to the function of his or her office, the prohibition may not be applicable.

In 85 Ops.Cal.Atty.Gen. 40 (2002), this office concluded that members of the board of directors of a public transit agency could accept passes for free transportation on the agency's buses in order to perform their duties of monitoring the agency's transportation services. The opinion was based on the rationale that the district had an obligation to provide those transportation services necessary for the members to perform their public duties. Because the agency is responsible for providing the transportation services without cost to the directors, the providing of such expenses does not constitute a prohibited gift irrespective of whether the district is granting free passes or reimbursing the directors for their expenses. (Whether a public transit agency constitutes a "transportation company" for purposes of the constitutional prohibition was beyond the scope of this opinion. The term may possibly refer exclusively to privately owned and operated transportation companies such as railroads, airlines, and cruise ship companies. (See Cal. Const., art. XII, § 3; *Los Angeles Met. Transit Authority v. Pub. Util. Com.* (1963) 59 Cal.2d 863, 870; *Board of Railroad Commissioners v. Market Street Railway Company* (1901) 132 Cal. 677, 678-680; Webster's 3d New Internat. Dict. (1971) p. 461 [company defined as "a chartered commercial organization"].)

D. INTERSTATE AND INTRASTATE TRAVEL COVERED

Over the years, this office has interpreted the constitutional prohibition against the acceptance of passes or discounts from transportation companies to apply to interstate as well as intrastate carriers and transportation. This interpretation applies irrespective of whether the interstate carrier in question does business in California and therefore applies to airline carriers over which the official has no jurisdiction. (See, 76 Ops.Cal.Atty.Gen. 1, *supra*.)

In Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (March 2, 1975), this office concluded that the prohibition applied to members of the Division of Tourism who wished to attend informational seminars at various locations to which the airlines would provide free transportation. In order to avoid any conflict with federal regulatory powers over the issuance of free passes, the letter indicated that the prohibition with respect to interstate transportation prohibited the officer from accepting the pass or discount and not on the transportation company for offering it. This office opined that the prohibition applied to interstate as well as intrastate travel in Cal.Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964). That letter concluded that the prohibition applied to Los Angeles City Airport Commissioners who wished to take a free airline trip to Tahiti.

In 1982, this office authorized the filing of a quo warranto lawsuit to remove two officers from the Santa Monica city government for violating the prohibition against the acceptance of free travel. The allegations were that the two officers had accepted free round-trip transportation from Los Angeles to London provided by Laker Airline.

In Cal.Atty.Gen., Indexed Letter, No. IL 71-159 (August 24, 1971), this office authorized another quo warranto lawsuit against the executive director and treasurer of the Redevelopment Agency of the City and County of San Francisco. There the officeholder accepted free round-trip passage from San Francisco to Taipei on China Airlines. In 1985, this office advised the Mayor of Burbank that acceptance of free transportation from Burbank, California to Durango, Colorado and free transportation on a railroad in Durango could violate the constitutional prohibition.

E. APPLICATION TO PUBLIC AND PERSONAL BUSINESS

The issue of public versus private business is generally not viewed as relevant to the application of the prohibition. Except for Public Utility Commissioners who are specifically authorized to accept free transportation in connection with the performance of official duties, the prohibition against the acceptance of free passes or discounts for transportation applies equally to acceptance of transportation in connection with one's official duties as it does in connection with one's personal business. Although the focus may be somewhat different, interpreters of the prohibition have concluded that the purpose of guarding against corruption and undue influence from transportation companies can result from the acceptance of free or discounted transportation in either context.

In Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (March 23, 1975), members of the Division of Tourism wished to attend informational seminars to which they would receive free airline transportation. The attendance at such seminars clearly was within the scope of the member's official public duties. Without discussing the distinction between public and private use of transportation, this office concluded that the constitutional prohibition acted to bar the members from accepting the free airline transportation. Similarly, in Cal.Atty.Gen., Indexed Letter, No. IL 70-155 (August 7, 1970), this office concluded that the executive director of a redevelopment agency was barred from accepting free transportation to assist him in the performance of his official duties. Again, the matter of the public versus the private use of the transportation was not discussed as a relevant factor in determining whether the prohibition applied.

In several other instances, the issue of public versus private business was not viewed as relevant to the application of the prohibition. (E.g., Cal.Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964) [in which the City of Los Angeles Airport Commissioners accepted free trips to Tahiti]; 1982 quo warranto authorization regarding officers of Santa Monica accepting a free round trip from Los Angeles to London; 1985 letter to Burbank mayor regarding transportation from Burbank to Colorado and rail transportation in Colorado.)

F. PENALTIES AND ENFORCEMENT

Article XII, section 7 of the California Constitution specifically provides that the acceptance of a pass or discount by a public officer other than a Public Utilities Commissioner, shall work a forfeiture of that office. The appropriate means for enforcing this forfeiture of office is the filing of a suit in quo warranto.

A quo warranto proceeding pursuant to Code of Civil Procedure section 803 is a civil action by which title to any public office may be determined. (*Barendt v. McCarthy* (1911) 160 Cal. 680, 686-687; 53 Cal.Jur.3d (1979) Quo Warranto, § 7.) The action may be commenced only under the authority of the Attorney General in the name of the People. (*People ex rel. Conway v. San Quentin Prison Officials* (1963) 217 Cal.App.2d 182.) Where such a proceeding is brought on the relation of a private individual (relator), the relator does not become a party to the action. The actions of the relator are under the supervision and complete control of the Attorney General. (*People v. Milk Producers Assn.* (1923) 60

Cal.App. 439, 443; *People ex rel. Conway v. San Quentin Prison Officials*, *supra*, 217 Cal.App.2d 182.)

The Attorney General requires submission of an application for leave to sue on behalf of the People. (Cal. Code Regs., tit. 11, §§ 1-10.) In deciding whether to issue leave to sue by a relator, the basic question is whether a public purpose would be served. (39 Ops.Cal.Atty.Gen. 85, 89 (1962).) This office must determine whether a substantial issue of fact or law exists which should be judicially determined. (*City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 648.) However, it is not the province of the Attorney General to pass upon the issues in controversy, for that is the role of the court. (35 Ops.Cal.Atty.Gen. 123 (1960).)

IX.

INCOMPATIBLE ACTIVITIES OF LOCAL OFFICERS AND EMPLOYEES

Government Code Section 1125 Et Seq.*

A. OVERVIEW

These sections, which were originally enacted in 1971, provide a statutory prohibition against any officer or employee of a local agency from engaging in any employment or other activity which is in conflict with his or her public duties. Government Code section 1125⁸ defines local agency to mean a “county, city, city and county, political subdivision, district, and municipal corporation.” Section 1126 contains the basic prohibition, and focuses on the remunerative activities of agency officials. See section 1098 concerning prohibition against disclosure of confidential information, which is punishable as a misdemeanor.

B. THE BASIC PROHIBITION

Section 1126 provides that a local officer or employee shall not engage in any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her official duties or the duties, functions or responsibilities of his or her appointing authority or employing agency. This general prohibition usually is not self-executing and, in order to give notice of what activities are incompatible, authorities and agencies must promulgate a statement of incompatible activities. The incompatible activities statement may address a broad range of conflict-of-interest issues. But an officer or an employee may not have sanctions imposed on him or her unless the officer or employee has violated a duly noticed statement. If a statement is adopted, the local agency shall enact rules providing notice to employees regarding prohibited activities, disciplinary action and appeal procedures.

C. PROHIBITION GENERALLY NOT SELF-EXECUTING

In 1980, the court in *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141 (hereinafter, “*Mazzola*”), ruled that section 1126 provided only authorization to implement a statutory prohibition by adoption of an incompatible activities statement as set forth in section 1126(b). The court reasoned that without notice, an employee could be subject to charges under section 1126 at any time. Therefore, before the prohibition can be applied to an employee based on his or her outside activities, the employee must be informed that those activities constitute a conflict of interest. (See also 70 Ops.Cal.Atty.Gen. 271 (1987).) In addition, the court indicated that the employee was entitled to receive notice of

*Selected statutory materials appear in appendix I (at p. 175).

⁸All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

the agency's intended disciplinary action and the procedures for appealing that action. Thus, aside from a narrow exception applicable only to school board members, discussed below, the prohibition is not self-executing.

D. PERSONS COVERED

Section 1126 applies to officers and employees of local agencies. This office has opined that employees include temporary consultants such as special counsel hired as independent contractors. (See, 70 Ops.Cal.Atty.Gen. 271, *supra*; 61 Ops.Cal.Atty.Gen. 18 (1978).)

In 64 Ops.Cal.Atty.Gen. 795 (1981), this office concluded that, in light of the *Mazzola* case, section 1126 did not apply to a member of the board of supervisors or any other elected official. This conclusion was based on an interpretation of the language of section 1126(b). By its terms, subdivision (b) provides that the guidelines, which the *Mazzola* court stated were a prerequisite to activating the prohibition, are to be adopted by the "appointing power." Since elected officials have no appointing authority, the opinion concluded that section 1126 was applicable only to local employees and not to elected officials.

In 1986, Education Code section 35233 was amended to make school boards subject to the requirements of section 1126. Since school boards have no appointing authority, this office concluded in 70 Ops.Cal.Atty.Gen. 157 (1987), that the provisions of section 1126(a) must be self-executing with respect to school boards if the amendment to Education Code section 35233 was to have any effect. Thus, section 1126 remains inapplicable to elected officials except for school board members where it is both applicable and self-executing.

E. PROHIBITED ACTIVITIES

In *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, the California Supreme Court ruled that local governments have broad discretion to limit incompatible activities of their employees. (*Id.* at p. 748.) After an involved analysis of legislative history, the court concluded that the enumerated activities set forth in section 1126, subdivision (b) did not constitute the exclusive list of prohibited activities. Rather, the court concluded that the list of enumerated activities was exemplary and did not represent either a floor or a ceiling on the activities which local governments could restrict as incompatible with public employment.

The court cited with favor the opinions of this office and stated that an examination of these opinions revealed a consistent interpretation applying the statute to any factual situation involving a potential conflict of loyalties, whether or not specifically enumerated in subdivision (b). (*Id.* at pp. 747-48, citing, 58 Ops.Cal.Atty.Gen. 109 (1975) [section 1126, subd. (b) doctrine of incompatibility applies to a member of a school board concurrently serving as a member of a city personnel board]; 63 Ops.Cal.Atty.Gen. 868 (1980) [county assessor may determine, pursuant to § 1126, subd. (b), that employee's purchase of land at tax-deeded land sale within the county is incompatible with his duties as an appraiser in the assessor's office]; 68 Ops.Cal.Atty.Gen. 175 (1985) [pursuant to § 1126, subd. (b), a city police department may determine whether the police chief may undertake to contract with private parties to provide private security services by off-duty police officers for a fee]; 70

Ops.Cal.Atty.Gen. 157, *supra*, [school board may determine, pursuant to § 1126, subd. (b), that a board member's operation of a private preschool facility for profit, conflicts with his duties as a member of the board].)

A variety of potential incompatible activities are enumerated in section 1126, subdivision (b). An outside activity which involves the use of the agency's time, resources, uniforms, or prestige may be prohibited. (§ 1126(b)(1).) If the outside activity involves double remuneration, i.e., private payment for the performance of an activity which he or she is already required to perform in his or her public capacity, such employment may be prohibited. (§ 1126(b)(2); see also Pen. Code, § 70.) If the result of this outside activity will ever in any way be subject to the control or audit or other scrutiny of the official's agency, it may be prohibited as well. (§ 1126(b)(3).) Finally, if the outside activity makes such great demands on the official's time that the official is hampered in the performance of his or her public duties, the activity may be forbidden. (§ 1126(b)(4).)

A local agency does not have as broad discretion to restrict the political activities of its officers or employees. Section 3203 prohibits placing restrictions upon the political activities of such officers or employees unless the restriction is otherwise authorized by sections 3201-3209 or is necessary to meet federal requirements relative to a particular employee or employees. Authorized restrictions include a prohibition from participating in political activities while in uniform, and prohibition or restrictions from engaging in political activity during working hours or on the local agency's premises, if the agency has adopted rules in that regard. (§§ 3206, 3207.) In addition, while officers or employees may solicit funds for ballot measures that may affect the working conditions of their employing agency, the agency may restrict its employees' activities during their working hours. (§ 3209.) Sections 3201-3209 also provide for restrictions upon an employee's political activities such as using one's office to influence, positively or negatively, another person's position within the state or local agency, and knowingly soliciting political funds from other local agency employees unless the request is made to a "significant segment of the public" that otherwise includes local agency officers or employees. (Restrictions upon the political activities of state officers or employees is discussed in Chapter X, *post*.)

In addition to these provisions, employees should be aware of Penal Code section 424, which prohibits the misuse of public funds and property for political or personal use. (See also *Stanson v. Mott* (1976) 17 Cal.3d 206; *League of Women Voters v. Countywide Crim. Justice Coordinating Com.* (1988) 203 Cal.App.3d 529.)

Section 1127 specifically states that off-duty employees (e.g., firefighters, police officers) may accept private employment which is related to and compatible with their public employment. To do so, the employee must receive permission from his or her supervisor and must be certified by the appropriate agency.

(For a discussion of the special incompatibility provisions for public attorneys, see section G of Chapter XI, concerning Government Code section 1128.)

F. PENALTIES AND ENFORCEMENT

The statute does not set forth any penalties or remedies for its violation. However, several enforcement vehicles would appear to be available. First, with respect to a local government employee, disciplinary action such as a letter of reprimand, suspension, or termination may be available depending upon the gravity of the violation. With respect to an appointed officer, a complaint could be filed with the appointing authority which may have the power to punish the officer or even terminate the officer's appointment in the case of a particularly serious violation. In addition, a taxpayer or member of the public may have the right to seek relief through injunction or mandamus.

If you have a question about an officer's or employee's outside activities, you should contact the appointing authority or employing agency for a copy of the applicable statement of incompatible activities, if one has been adopted. A member of the public is entitled to a copy of the statement through the Public Records Act as set forth in Government Code sections 6250 et seq.

X.

INCOMPATIBLE ACTIVITIES OF STATE OFFICERS AND EMPLOYEES

Government Code Section 19990*

A. OVERVIEW

The prohibitions applicable to state officers and employees as contained in Government Code section 19990⁹ are similar to those applicable to local officials under section 1126. (See Chapter IX of this pamphlet). Like section 1126, section 19990 creates a general prohibition followed by specific areas of conduct which should be covered in an incompatible activities statement adopted by an employee's appointing power.

B. THE BASIC PROHIBITION

Initially, section 19990 prohibits state officers and employees from engaging in any activity or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to their duties as state officers or employees. Each state agency is required to develop, subject to the approval of the Department of Personnel Administration, a statement of incompatible activities for its officers and employees. As discussed below, the statute sets forth several activities that are deemed to be inconsistent, incompatible or in conflict with the duties of a state officer or employee.

C. PROHIBITION MAY NOT BE SELF-EXECUTING

In construing section 1126, which is applicable to local officers and employees, the court in *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141, concluded that the general prohibition was not self-executing. There, the City and County of San Francisco had appointed and reappointed a plumbers' union official to the position of airport commissioner. At the time of the appointments, the city had full knowledge that the commissioner was a union official. After several unions, including the plumbers' union, engaged in a lengthy strike against the city, the Board of Supervisors removed the commissioner from office based on "official misconduct." The court set aside that decision, stating that the prohibition against incompatible activities could be exercised only through the agency's adoption of an incompatible activities statement which specifically notified employees of the prohibited activities. The court took the position that a general ban on activities which were inconsistent, incompatible, in conflict with or inimical to one's public duties was too vague to have any effect without the adoption of specific guidelines by the employee's agency. There is no case law construing section 19990. However, the same argument could be made with respect to section 19990.

*A copy of this statute appears in appendix J (at p. 177).

⁹All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

D. PERSONS COVERED

There is some question as to whether section 19990 covers state officers who are outside the state civil service. The provision concerning the incompatible activities statement provides:

Each appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees. . . .

(§ 19990; emphases added.)

In the past, section 19251, predecessor to section 19990, was interpreted by this office to apply to civil service employees only. (53 Ops.Cal.Atty.Gen. 163 (1970).) This conclusion, in part, was based upon the fact that the prohibition and the remedies were placed in the civil service portions of the Government Code. However, in 1981, section 19251 was repealed and replaced with section 19990, which is contained in the portion of the Government Code applicable to the Department of Personnel Administration. These provisions are applicable to both civil service and non-civil service employees and officers of state government. (§ 19815 et seq.) For the purposes of the Government Code sections under the jurisdiction of the Department of Personnel Administration, section 19815(d) defines the term “employee” to include “. . . all employees of the executive branch of government who are not elected to office.”

Thus, there are strong indications that section 19990 covers all non-elected, executive branch officers and employees, not just those who are members of the civil service. However, the only remedy for violating an incompatible activities statement continues to appear in section 19572(r) as a reason for imposing discipline on a civil service employee. In addition, the term “appointing power” is defined in section 18524 as the entity authorized to appoint civil service personnel. Nevertheless, these factors do not conclusively bar the application of section 19990 to non-civil service personnel. For example, non-civil service employees could be subject to disciplinary action or removal under the terms of their appointment.

E. PROHIBITED ACTIVITIES

Only those outside activities that are clearly incompatible, inconsistent or in conflict with the employee’s public duties may be restricted. (73 Ops.Cal.Atty.Gen. 239 (1990); see also *Keeley v. State Personnel Board* (1975) 53 Cal.App.3d 88 [prison guard terminated because of his ownership and operation of a liquor store].) The types of activities specifically enumerated for coverage by incompatible activities statements include: using the prestige or influence of the state for private gain; using state facilities, time, equipment, or supplies for private gain; using confidential information for private gain (see also Government Code section 1098, which prohibits the disclosure of confidential information for pecuniary gain); receiving compensation from other than the state for the performance of state duties; performing private activities which later may be subject to the control, review, inspection, audit, or enforcement by the officer or employee; and receiving anything of value from a person regulated by or seeking to do business with the official’s agency where the item of

value could be reasonably interpreted as having been intended to influence the official. Section 19990 specifically states that incompatible activities shall include, but are not limited to, the enumerated areas of conduct specified in the statute.

Further, in *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, the Supreme Court held that local governments have broad discretion to regulate conflict-of-interest situations. Thus, the statutory language combined with the *Long Beach Police Officers Assn.* holding make it clear that state agencies have broad authority to regulate conflict-of-interest situations as well.

There is, however, less discretion afforded with respect to regulating the political activities of state officers or employees. Pursuant to section 3208, except as otherwise provided in section 19990, the limitations contained in sections 3201-3209 are the only permissible restrictions on the political activities of state employees. (The restrictions upon the political activities of local officers and employees are discussed in Chapter IX, *ante*.) In addition to these provisions, employees should be aware of section 8314 and Penal Code section 424, which prohibit the misuse of public funds and property for political or personal use. (See also *Stanson v. Mott* (1976) 17 Cal.3d 206; *League of Women Voters v. Countywide Crim. Justice Coordinating Com.* (1988) 203 Cal.App.3d 529.)

It should also be noted that the private use of expertise acquired during the performance of one's official duties is not necessarily prohibited. (See, 73 Ops.Cal.Atty.Gen. 239, *supra*, [under specified circumstances, a State Franchise Tax Board employee can teach courses on tax law].)

F. PROCEDURAL CONSIDERATIONS

With respect to civil servants, prior to any determination that an employee has engaged in proscribed activities, the employee must be given notice and subsequently must be afforded appeal rights to contest any finding. (See, *Mazzola, supra*, 112 Cal.App.3d at pp. 154-155.) Since violations of the statement of incompatible activities are a matter of civil service employee discipline pursuant to section 19572(r), all of the safeguards provided by the Government Code and the State Personnel Board in connection with employee disciplinary hearings are applicable. If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to section 3517.5, the memorandum of understanding shall be controlling without further legislative action, unless the expenditure of funds is involved, in which case such expenditures must be approved by the Legislature in the budget act.

G. PENALTIES AND ENFORCEMENT

Section 19990 does not set forth any penalties or remedies for its violation. However, several enforcement vehicles are available. First, with respect to state government employees, disciplinary action such as reprimand, suspension, or termination of employment is available depending upon the gravity of the violation. (§ 19572(r).) With respect to an appointed officer, a complaint could be filed with the appointing authority which may have the power to punish the officer or even terminate the officer's appointment in the case of a

particularly serious violation. In addition, a taxpayer or member of the public may have the right to seek relief through injunction or mandamus. Further, members of the public may file a complaint with the State Personnel Board pursuant to section 19583.5 requesting that disciplinary action be taken against the state employee.

If you have a question about an officer's or employee's outside activities, you should contact the appointing authority or employing agency for a copy of the applicable statement of incompatible activities or memorandum of understanding. A member of the public is entitled to a copy of the statement or memorandum through the Public Records Act as set forth in Government Code section 6250 et seq.

XI.

THE COMMON LAW DOCTRINE OF INCOMPATIBLE OFFICES

A. OVERVIEW

The doctrine of incompatible offices concerns a potential clash of two public offices held by a single official. Thus, the doctrine concerns a conflict between potentially overlapping public duties. (*People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636; see also *Mott v. Hortsmann* (1950) 36 Cal.2d 388; 56 Ops.Cal.Atty.Gen. 488 (1973).) This is distinguishable from traditional conflict of interest which involves a potential clash between an official's private interests and his or her public duties. Confusion of these concepts sometimes results from the use of the term "incompatibility" in connection with the doctrine of incompatibility of offices on the one hand and the conflict-of-interest notion of incompatible activities on the other. (55 Ops.Cal.Atty.Gen. 36, 39 (1972).)

B. THE BASIC PROHIBITION

The doctrine of incompatible offices is court-made or "common law." (For a brief discussion of common law, see discussion in Section A of Chapter XII.) To fall within the common law doctrine of incompatible offices, two elements must be present. (68 Ops.Cal.Atty.Gen. 337 (1985).) First, the official in question must hold two public offices simultaneously. Second, there must be a potential conflict or overlap in the functions or responsibilities of the two offices.

The doctrine of incompatible offices was announced in the landmark case of *People ex rel. Chapman v. Rapsey, supra*, 16 Cal.2d at pp. 636, 641-642 (hereinafter, "*Rapsey*"). In that case, the court identified factors that must be addressed in evaluating issues under the incompatible offices doctrine: whether there is any significant clash of duties or loyalties between the offices; whether considerations of public policy make it improper for one person to hold both offices; and whether either officer exercises a supervisory, auditing, appointive, or removal power over the other.

In *Rapsey*, a city judge accepted an appointment as city attorney. The court concluded that the two positions in question were public offices and that there was a significant clash in their respective duties and functions.

(For special rules governing public attorneys, see the discussion in section G of this chapter; Government Code section 1128, 66 Ops.Cal.Atty.Gen. 382 (1983) (local); Government Code section 19990.6 (state).)

C. DOCTRINE MAY BE ABROGATED BY STATUTE, CHARTER OR ORDINANCE

At the outset, it should be noted that a common law doctrine can be superseded by legislative enactment. Thus, the Legislature or other legislative body may choose to expressly authorize the holding of dual offices notwithstanding the fact that this would otherwise be prohibited by the common law doctrine. In *American Canyon Fire Protection Dist. v. County of Napa*

(1983) 141 Cal.App.3d 100, 104, the court concluded that the members of a county board of supervisors could act as the governing board of a special district and distribute county funds to the district, stating:

Although a conflict of interest may arise under the common law rule against incompatible offices, “There is nothing to prevent the Legislature. . . from allowing, and even demanding, that an officer act in a dual capacity. (*McClain v. County of Alameda* (1962) 209 Cal.App.2d 73, 79 [25 Cal.Rptr. 660].)

In 78 Ops.Cal.Atty.Gen. 60 (1995), this office concluded that section 6508, concerning the creation and powers of joint powers agencies, was intended to ensure that the common law rule does not apply to joint powers agencies or their governing boards. Accordingly, a member of a city council may serve as a member of an airport commission which is a joint powers agency comprised of the city and other governmental agencies. After concluding that the offices of city and county planning commissioners were incompatible, this office in 66 Ops.Cal.Atty.Gen. 293, 302 (1983) stated: “It is concluded, therefore, that the county and city may provide by coordinate legislation for the simultaneous holding of the offices in question notwithstanding the common law rule.” A city charter also may abrogate the common law rule. (82 Ops.Cal.Atty.Gen. 201 (1999); 73 Ops.Cal.Atty.Gen. 357 (1990); 66 Ops.Cal.Atty.Gen. 293 (1983).)

In 81 Ops.Cal.Atty.Gen. 344 (1998), we concluded that a city council of a general law city may serve as the board of directors for fire protection and water districts in the city because it is designated as the “ex-officio board of directors” of such limited powers districts. (§ 56078.)

D. PUBLIC OFFICE VERSUS EMPLOYMENT

In *Rapsey, supra*, 16 Cal.2d 636, 640, the court defined the elements of a public “office” as including “the right, authority, and duty, created and conferred by law -- the tenure of which is not transient, occasional, or incidental -- by which for a given period an individual is invested with power to perform a public function for public benefit.” In 82 Ops.Cal.Atty.Gen. 83, 84 (1999) this office summarized the court’s conclusions as follows:

For the purposes of the doctrine, we have summarized the nature of a public office as (1) a position in government, (2) which is created or authorized by the Constitution or by law, (3) the tenure of which is continuing and permanent, not occasional or temporary, (4) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state. [Citation.]

Members of advisory boards and commissions do not hold “offices” for purposes of the common law rule since they do not exercise any of the sovereign powers of the State. (83 Ops.Cal.Atty.Gen. 153 (2000); 83 Ops.Cal.Atty.Gen. 50 (2000); 62 Ops.Cal.Atty.Gen. 325, 331 (1979); 57 Ops.Cal.Atty.Gen. 583, 585 (1974); 42 Ops.Cal.Atty.Gen. 93, 94-97 (1963).)

Since an “employment” is not an “office,” the doctrine of incompatible offices does not preclude an official from simultaneously holding an office and an employment. (58 Ops.Cal.Atty.Gen. 109, 111 (1975); But see Government Code section 53227 and Education Code section 35107(b) which forbid any employee from simultaneously serving on the governing board of his or her employer.)

A deputy to a principal is not necessarily deemed to be holding the same office as the principal for purposes of the incompatible offices doctrine; only where the deputy stands in the principal’s shoes with respect to policy making decisions will the deputy be deemed to be holding the same office as the principal for purposes of the doctrine. (See 78 Ops.Cal.Atty.Gen. 362 (1995), modifying 63 Ops.Cal.Atty.Gen. 710 (1980).)

Employment with a public agency which is governed by contract, rather than by law, generally is not an office under the Incompatible Offices Doctrine. (76 Ops.Cal.Atty.Gen. 244 (1993).)

When a person holds offices with two governmental entities and there is overlapping geographical and subject matter jurisdiction the offices generally are incompatible. The following are citations to opinions that exemplify this principle:

- **county board of supervisors member and community college board member** (78 Ops.Cal.Atty.Gen. 316 (1995))
- **fire chief and board of supervisors member** (66 Ops.Cal.Atty.Gen. 176 (1983))
- **public utility district member and county board of supervisors member** (64 Ops.Cal.Atty.Gen. 137 (1981))
- **school district trustee and city council member** (73 Ops.Cal.Atty.Gen. 354 (1990))
- **school board member and city council member** (65 Ops.Cal.Atty.Gen. 606 (1982))
- **county planning commissioner and city council member** (63 Ops.Cal.Atty.Gen. 607 (1980))
- **fire chief and city council member** (76 Ops.Cal.Atty.Gen. 38 (1993))
- **county planning commissioner and city planning commissioner** (66 Ops.Cal.Atty.Gen. 293 (1983))
- **county planning commissioner and county water district director** (64 Ops.Cal.Atty.Gen. 288 (1981))
- **city planning commissioner and school district board member** (84 Ops.Cal.Atty.Gen. 91 (1997))
- **city manager and school district board member** (80 Ops.Cal.Atty.Gen. 74 (1997))
- **school district board member and community services district board member** (75 Ops.Cal.Atty.Gen. 112 (1992))

The relationship between a water district and a school district, some portion of which is within the boundaries of the water district, serves to illustrate how an incompatibility can arise. In 85 Ops.Cal.Atty.Gen. 199 (2002), this office concluded that a significant clash of duties and loyalties could arise in connection with the Water District setting the wholesale water rate that will be passed on to the School District, determining the need for restrictions on water usage during times of a water shortage, and imposing conditions for providing sanitation services to the School District. (See also, 85 Ops.Cal.Atty.Gen. 60 (2002); 82

Ops.Cal.Atty.Gen. 74 (1999); 82 Ops.Cal.Atty.Gen. 68 (1990); 73 Ops.Cal.Atty.Gen.183 (1990); 73 Ops.Cal.Atty.Gen. 268 (1990).)

When one of the positions is an “employment” instead of an “office,” the doctrine of incompatible offices is not applicable. Persons holding civil service and other non-officer positions are employees and are not subject to the doctrine. However, specific statutes may limit their office holding. (See discussion below.) Following is a brief listing of several positions that have been determined to be employments rather than offices.

- Assistant city manager was not an office because neither the position nor the duties were referred to in the city charter or statute. The fact that the assistant city manager performed some of the duties of the city manager did not make the position an office. (80 Ops.Cal.Atty.Gen. 74 (1997).)
- A line officer with the police department does not hold an office. (*Neigel v. Superior Court* (1977) 72 Cal.App.3d 373.)
- A sheriff’s deputy chief does not hold an office. (78 Ops.Cal.Atty.Gen. 362 (1995).)
- Fire captain (68 Ops.Cal.Atty.Gen. 337 (1985)) and fire division chief (74 Ops.Cal.Atty.Gen. 82 (1991)) are not offices.
- Community development director is not an office. In 82 Ops.Cal.Atty.Gen. 83 (1999), we analyzed his position as follows:

The director’s formal job description indicates that he exercises managerial functions for the city under the supervision and direction of the city manager. Such managerial functions and supervision are indicative of an employment relationship rather than the holding of a public office. (78 Ops.Cal.Atty.Gen., *supra*, at 368.) Moreover, the director holds a civil service classification with the city as did the police officer in *Neigel v. Superior Court*, *supra*, 72 Cal.App.3d at 373. He does not serve a definite “term” or at the pleasure of the appointing authority, and his policy making authority is limited by the conditions of his job description and his subordination to the city manager.

- Superintendent of a school district was not an office. Where he was subject to the direction and control of the school board and did not exercise independent authority granted by statute or charter. (62 Ops.Cal.Atty.Gen. 615 (1979).)

In *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, the court determined that the doctrine did not bar a nurse from holding office as a member of the board of directors of the hospital district which employed her because the position of nurse is an employment rather than an office. (*Id.* at p. 319.) However, in response to the *Eldridge* decision and 73 Ops.Cal.Atty.Gen. 191 (1990), the Legislature enacted Government Code

section 53227 and Education Code section 35107(b), which prohibit employees from simultaneously holding office as a member of the governing board that employs them.

E. POTENTIAL CONFLICT IN DUTIES OR FUNCTIONS

With respect to a conflict between the duties or functions of two offices, a clash between the two offices in the context of a particular decision need not be proved, in order to trigger the doctrine of incompatible offices. It is enough that there is the potential for a significant clash between the two offices at some point in the future. (See 85 Ops.Cal.Atty.Gen. 60 (2002); 84 Ops.Cal.Atty.Gen. 91 (2001); 78 Ops.Cal.Atty.Gen. 316 (1995); 64 Ops.Cal.Atty.Gen. 288, *supra*, at p. 289.)

The *Rapsey* court, 16 Cal.2d, *supra*, at pp. 641-642, discussed the conflict between offices in the following passage:

Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both.

One of the most basic incompatibilities arises when a single person holds two offices where one office has supervisory authority over the other. In 81 Ops.Cal.Atty.Gen. 304 (1998), this office concluded that a person could not be both the city manager and the police chief because the city manager had budgetary and supervisory authority over the police chief. (See also 82 Ops.Cal.Atty.Gen. 201 (1999) [city administrator and fire chief]; 76 Ops.Cal.Atty.Gen. 38 (1993) [city council member, manager and fire chief].)

In 78 Ops.Cal.Atty.Gen. 316, *supra*, this office concluded that a member of a county board of supervisors could not simultaneously serve as a member of the Board of Governors of the California Community Colleges. There, we found an inconsistency in the duties because a supervisor and a member of the Board of Governors could have divided loyalties over matters concerning the use of college district property, the issuance of district bonds, as well as matters pertaining to funding and fees. Likewise, in 65 Ops.Cal.Atty.Gen. 606, *supra*, this office opined that there was significant potential for a conflict between a city council member and a school board member. The opinion discussed six areas of potentially overlapping jurisdiction which could lead to a clash in official loyalties for an individual holding both positions. (*Id.* at p. 607.) The areas of potential conflict ranged from financial and budgetary matters to zoning and development issues.

In 64 Ops.Cal.Atty.Gen. 288, *supra*, at p. 291, this office discussed potential conflicts in several factual contexts. With respect to a conflict between the offices of city planning commissioner and state highway commissioner, the opinion stated: “What is best for the

state in highway location may differ significantly as to what . . . is best for the . . . city itself.” (*Ibid.*)

With respect to a conflict between the offices of county planning commissioner and a member of the county water district, the opinion stated: “Likewise, what is best for the county in its planning activities may differ significantly from what is best for the county water district and the exercise of its independent powers.” (*Ibid.*)

For similar reasons, we opined that the simultaneous holding of office as a member of the boards of directors of two water districts was incompatible because the actions of one district could have an effect on the interests of the other. (76 Ops.Cal.Atty.Gen. 81 (1993).) Likewise, we have concluded that an individual may not simultaneously hold the office of county superintendent of schools and member of the State Board of Education. (74 Ops.Cal.Atty.Gen. 116 (1991).)

However in 71 Ops.Cal.Atty.Gen. 39, 42 (1988), this office concluded that an individual could be a member simultaneously of the State Industrial Welfare Commission and the Personnel Commission of the Los Angeles County Superintendent of Schools. This conclusion was based on the absence of any incompatibility between the two offices:

While we entertain no doubt that both of the positions in question are public offices, we predicate our conclusion herein exclusively upon the absence of incompatibility between them. The commission is concerned solely with public employees, i.e., the classified employees of the County Superintendent of Schools. As we shall see, I.W.C. is concerned solely with employees in the private sector. Neither agency has any official interest in or jurisdiction over the province of the other.

When two offices held by the same person are consolidated, the common law rule of incompatible offices may be violated if one office is made subordinate to the other. (*People ex rel. Deputy Sheriffs’ Assn. v. County of Santa Clara* (1996) 49 Cal.App.4th 1471.)

F. PENALTIES AND ENFORCEMENT

Where a public official is found to have accepted two public offices, the common law provides for an automatic vacating of the first office. (See 66 Ops.Cal.Atty.Gen. 293, *supra*, at p. 295; 66 Ops.Cal.Atty.Gen. 176, *supra*, at p. 178; 65 Ops.Cal.Atty.Gen. 606, *supra*, at p. 608.) The appropriate mechanism for enforcing the vacating of the office is a suit in quo warranto under section 803 of the Code of Civil Procedure. (See Chapter VIII, section F regarding the quo warranto remedy; *Rapsey*, *supra*, 16 Cal.2d 636.) Disqualification or abstention from those decisions where an actual clash of the two offices is found to occur, is not an available remedy under common law. (See 66 Ops.Cal.Atty.Gen. 176, *supra*, at pp. 177-178; 63 Ops.Cal.Atty.Gen. 710, *supra*, at pp. 715-717.) However, notwithstanding the legal forfeiture, the person remains in the prior position as a de facto member until he or she actually resigns or is removed from office by a quo warranto action or other lawsuit. (74 Ops.Cal.Atty.Gen. 116 (1991).)

G. SPECIAL PROVISION FOR PUBLIC ATTORNEYS

In 1981, the Legislature added section 1128 to the Government Code concerning the right of public attorneys to hold other elective or appointive office. In 63 Ops.Cal.Atty.Gen. 710, *supra*, this office concluded that the incompatibility of office doctrine applied to a deputy if his or her principal would be prohibited from holding the other office in question. The opinion also concluded that the doctrine of incompatibility of offices may not be avoided by use of abstention or by realigning or limiting a deputy's duties.

In 66 Ops.Cal.Atty.Gen. 382, *supra*, this office interpreted Government Code section 1128. The opinion concluded that the statutory provision modified the common law in several respects. First, the statute does not prohibit a public attorney from holding an appointive or elective office merely because a potential conflict may arise. Second, in the case of an actual conflict, transactional disqualification rather than forfeiture is required. Third, the statute not only applies to a deputy who stands in the shoes of his or her principal but to the principal himself or herself. (See 74 Ops.Cal.Atty.Gen. 86 (1991) [deputy district attorney may serve on city council]; 67 Ops.Cal.Atty.Gen. 347 (1984) [appointed city attorney may serve on airport commission].)

This office has opined that, when an actual conflict arises between the duties or responsibilities of a non-elective public attorney's two offices, section 1128 does not result in the automatic forfeiture of either office. However, in the event of such a conflict, the public attorney could be held accountable for misconduct in office or a violation of the rules of professional conduct, or could be subject to recall from elective office or subject to disciplinary action by his or her appointing authority. (66 Ops.Cal.Atty.Gen. 382, *supra*.)

A similar provision for state attorneys and state administrative law judges holding local elective or appointive offices is contained in Government Code section 19990.6.

XII.

THE COMMON LAW DOCTRINE AGAINST CONFLICTS OF INTEREST

A. OVERVIEW

Courts and this office have, in the past, found conflicts of interest by public officials to be violative of both the common law and statutory prohibitions. (The common law is a body of law which has been made by precedential court decisions and can be found in the reported California Supreme Court and Appellate Court cases. This law differs from statutory law which is created by the combined action of the State Legislature and the Governor.) (See the discussion in Kaufmann, *The California Conflict of Interest Laws* (1963) 36 So.Cal. L.Rev. 186.)

Although this office continues, for the sake of completeness, to refer to the common law doctrine in our opinions (see, e.g., 67 Ops.Cal.Atty.Gen. 369, 381 (1984) and citations therein) it could be argued that its application has been severely limited by the passage of the Political Reform Act of 1974. In this regard Cal.Atty.Gen., Indexed Letter, No. IL 76-69 (April 6, 1976) stated:

Though one might urge that the Political Reform Act of 1974 has now preempted the common law doctrine against conflict of interest, and therefore that which is not specifically prohibited is now permitted, we would caution against such a conclusion for the reasons (1) that the courts have traditionally predicated their decisions on the dual basis of the statutes and the common law rule, see 58 Ops.Cal.Atty.Gen. 345, 354-56, *supra*, and (2) were a violation of the common law rule found to exist, such could form the basis of an allegation of willful misconduct in office within the meaning of section 3060 *et seq.*

(See also 59 Ops.Cal.Atty.Gen. 604 (1976).)

B. THE BASIC PROHIBITION

A good expression of the common law doctrine is found in *Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51: “A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public. [Citations.]”

This office has cautioned that where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the longstanding common law doctrine. (53 Ops.Cal.Atty.Gen. 163 (1970).) That opinion advised that the inquiry to be made was into the possibility that an official’s private interests might be enhanced through his or her official action. Another judicial explication of the common law doctrine was in *Terry v. Bender* (1956) 143 Cal.App.2d 198. In that case the court stated: “Public officers

are obligated, . . . [by virtue of their office], to discharge their responsibilities with integrity and fidelity.” (*Id.*, at p. 206.)

In 26 Ops.Cal.Atty.Gen. 5, 7 (1955), this office advised that if a situation arises where a common law conflict of interest exists as to a particular transaction, the official “is disqualified from taking any part in the discussion and vote regarding” the particular matter.

In *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, the court concluded that in an adjudicatory hearing, the common law is violated if a decision maker is tempted by his or her personal or pecuniary interests. In addition, the doctrine applies to situations involving a nonfinancial personal interest. (*Id.* at p. 1171, fn. 18.)

XIII.

CODE OF ETHICS

Government Code Section 8920 Et Seq.

A. THE BASIC PROHIBITION

Government Code section 8920, the Code of Ethics, applies to state elected and appointive officers. It does not apply to civil service employees. The Code of Ethics generally prohibits officers from participating in decisions which will have a direct monetary effect on them.

Specifically, the Code of Ethics prohibits officers from:

- having any direct or indirect financial interest, or
- engaging in any business transaction or professional activity, or
- incurring any financial obligation

which is in substantial conflict with the proper discharge of the official's duties.

A substantial conflict arises when an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity. Where the officer will be so affected by a decision, the officer should disqualify himself or herself from the decision.

A substantial conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member.

Violations are punishable as misdemeanors.

B. SPECIAL RULES FOR LEGISLATIVE OFFICIALS

Briefly summarized, the Code of Ethics prohibits legislators and legislative employees from doing the following:

1. Accepting employment which the legislator or legislative employee has reason to believe would impair his or her independence of judgment as to official duties or which would induce the legislator or legislative employee to disclose confidential information acquired by him or her in the course of, and by reason of, official duties. (§ 8920 (b)(1).)

2. Willfully and knowingly disclosing confidential information acquired in the course of and by reason of his or her official duties or using that information for pecuniary gain. (§ 8920 (b)(2).)
3. In general, accepting or agreeing to accept, or being in partnership with any person who accepts or agrees to accept, any employment, fee, or other thing of monetary value, in consideration of his or her appearing, agreeing to appear, or taking any action on behalf of another person before any state board or agency.

Exceptions to this prohibition include the following:

- a. attorney representation before any court,
 - b. representation before the Workers' Compensation Appeals Board,
 - c. inquiries on behalf of constituents,
 - d. advocacy without compensation,
 - e. intervention on behalf of others to require a state board or agency to perform a ministerial, non discretionary act,
 - f. advocacy on behalf of the legislator or legislative employee himself or herself,
 - g. receipt of partnership or firm compensation, if the legislator or legislative employee does not share either directly or indirectly in any fee, less any expenses attributable to the fee resulting from the transaction. (§ 8920 (b)(3).)
4. Receiving or agreeing to receive anything of value for services in connection with the legislative process. (§ 8920 (b)(4).)
5. Participating, by taking any action, on the floor of either house or in committee or elsewhere, in the passage or defeat of legislation in which a legislator or legislative employee has a personal interest, except as follows:
 - a. **Disclosure:** If the Member files a statement disclosing his or her personal interest to be entered on the journal, and states that he or she is able to cast a fair and objective vote, he or she may vote for the final passage of the legislation.
 - b. **Nondisclosure:** The Member may be excused from disclosing his or her personal interest in legislation and from voting for the final passage of that legislation, without any entry in the journal if the Member believes that he or she should abstain from voting and he or she informs the presiding officer prior to the commencement of the vote. (§ 8920 (b)(5).)

XIV.

CONFLICT-OF-INTEREST STATUTES APPLICABLE TO PARTICULAR OFFICERS OR AGENCIES

In addition to statutes of general applicability (e.g., Political Reform Act of 1974; Gov. Code, §1090), there are a multitude of conflict-of-interest statutes which are applicable only to particular officers or agencies. The statutes may go beyond and be more sweeping than the general statutes discussed above. Some may be directed to conflicts which may arise on a transactional basis and will permit abstention. Others may be so broad as to constitute a qualification for holding office (i.e., one may not possess specified financial interests and hold office simultaneously). It is beyond the scope of this pamphlet to attempt to set forth all such statutes. However, anyone who is attempting to determine if a conflict of interest exists in a particular instance, must be aware of the fact that these special statutes may exist and must, therefore, determine from the law establishing a particular office or agency, whether any special conflict-of-interest statutes have been enacted.¹⁰

It must also be emphasized that these special statutes will, in all probability, have had their origin in legislation which was enacted prior to the PRA. Consequently, the normal rule that a special statute controls a more general statute may have been modified by the provisions of section 81013 of that Act. As has been noted numerous times throughout this pamphlet, the PRA prevails over any other act of the Legislature in cases of direct conflict. It is beyond the scope of this discussion to attempt to define or point out areas of conflict between the PRA and special statutes. Each situation must be analyzed on its particular facts to determine the viability of the special statutory provision.

¹⁰See generally West's Annotated California Codes, General Index, under the heading "Adverse or Pecuniary Interest" or Deering's Annotated California Codes, General Index, "Conflicts of Interest."

APPENDICES

APPENDIX A

Government Code Sections 87100, 87101, 87103, 87103.5

§ 87100.

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

§ 87101.

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.

§ 87103.

A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- (e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

§ 87103.5.

(a) Notwithstanding subdivision (c) of Section 87103, a retail customer of a business entity engaged in retail sales of goods or services to the public generally is not a source of income to an official who owns a 10-percent or greater interest in the entity if the retail customers of the business entity constitute a significant segment of the public generally, and the amount of income received by the business entity from the customer is not distinguishable from the amount of income received from its other retail customers.

(b) Notwithstanding subdivision (c) of Section 87103, in a jurisdiction with a population of 10,000 or less which is located in a county with 350 or fewer retail businesses, a retail customer of a business entity engaged in retail sales of goods or services to the public generally is not a source of income to an official of that jurisdiction who owns a 10-percent or greater interest in the entity, if the retail customers of the business entity constitute a significant segment of the public generally, and the amount of income received by the business entity from the customer does not exceed one percent of the gross sales revenues that the business entity earned during the 12 months prior to the time the decision is made.

(c) For the purposes of subdivision (b):

(1) Population in a jurisdiction shall be established by the United States Census.

(2) The number of retail businesses in a county shall be established by the previous quarter's Covered Employment and Wages Report (ES-202) of the Labor Market Information Division of the California Employment Development Department.

APPENDIX B

Government Code Sections 82030, 82033, 82034

§ 82030.

(a) "Income" means, except as provided in subdivision (b), a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse. Income also includes an outstanding loan. Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. "Income," other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.

(b) “Income” also does not include:

(1) Campaign contributions required to be reported under Chapter 4(commencing with Section 84100).

(2) Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

(3) Any devise or inheritance.

(4) Interest, dividends, or premiums on a time or demand deposit in a financial institution, shares in a credit union or any insurance policy, payments received under any insurance policy, or any bond or other debt instrument issued by any government or government agency.

(5) Dividends, interest, or any other return on a security which is registered with the Securities and Exchange Commission of the United States government or a commodity future registered with the Commodity Futures Trading Commission of the United States government, except proceeds from the sale of these securities and commodities futures.

(6) Redemption of a mutual fund.

(7) Alimony or child support payments.

(8) Any loan or loans from a commercial lending institution which are made in the lender’s regular course of business on terms available to members of the public without regard to official status.

(9) Any loan from or payments received on a loan made to an individual’s spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, uncle, aunt, or first cousin, or the spouse of any such person, provided that a loan or loan payment received from any such person shall be considered income if he or she is acting as an agent or intermediary for any person not covered by this paragraph.

(10) Any indebtedness created as part of a retail installment or credit card transaction if made in the lender’s regular course of business on terms available to members of the public without regard to official status.

(11) Payments received under a defined benefit pension plan qualified under Internal Revenue Code Section 401(a).

(12) Proceeds from the sale of securities registered with the Securities and Exchange Commission of the United States government or from the sale of commodities futures registered with the Commodity Futures Trading Commission of the United States government if the filer sells the securities or the commodities futures on a stock or commodities exchange and does not know or have reason to know the identity of the purchaser.

§ 82033.

“Interest in real property” includes any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater.

§ 82034.

“Investment” means any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights, warrants, options, debt instruments and any partnership or other ownership interest owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family, if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. No asset shall be deemed an investment unless its fair market value equals or exceeds two thousand dollars (\$2,000). The term “investment” does not include a time or demand deposit in a financial institution, shares in a credit union, any insurance policy, interest in a diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940 or a common trust fund which is created pursuant to Section 1564 of the Financial Code, or any bond or other debt instrument issued by any government or government agency. Investments of an individual includes a pro rata share of investments of any business entity, mutual fund, or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater. The term “parent, subsidiary or otherwise related business entity” shall be specifically defined by regulations of the commission.

APPENDIX C

California Code of Regulations, Title 2,
Sections 18700 - 18708

§ 18700.

(a) No public official at any level of state or local government may make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a disqualifying conflict of interest. A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his/her economic interests, unless that effect is indistinguishable from the effect on the public generally. A conflict of interest is disqualifying if the public official’s participation is not legally required.

(b) To determine whether a given individual has a disqualifying conflict of interest under the Political Reform Act, proceed with the following analysis:

(1) Determine whether the individual is a public official, within the meaning of the Act. (See Government Code section 82048; Cal. Code Regs., tit. 2, § 18701.) If the individual is not a public official, he or she does not have a conflict of interest within the meaning of the Political Reform Act.

(2) Determine whether the public official will be making, participating in making, or using or attempting to use his/her official position to influence a government decision. (See Cal. Code Regs., tit. 2, § 18702.) If the public official is not making, participating in making, or using or attempting to use his/her official position to influence a government decision, then he or she does not have a conflict of interest within the meaning of the Political Reform Act.

(3) Identify the public official's economic interests. (See Cal. Code Regs., tit. 2, § 18703.)

(4) For each of the public official's economic interests, determine whether that interest is directly or indirectly involved in the governmental decision which the public official will be making, participating in making, or using or attempting to use his/her official position to influence. (See Cal. Code Regs., tit. 2, § 18704.)

(5) Determine the applicable materiality standard for each economic interest, based upon the degree of involvement determined pursuant to California Code of Regulations, title 2, section 18704. (See Cal. Code Regs., tit. 2, § 18705.)

(6) Determine whether it is reasonably foreseeable that the governmental decision will have a material financial effect (as defined in California Code of Regulations, title 2, section 18705) on each economic interest identified pursuant to California Code of Regulations, title 2, section 18703. (See Cal. Code Regs., tit. 2, § 18706.) If it is not reasonably foreseeable that there will be a material financial effect on any of the public official's economic interests, he or she does not have a conflict of interest within the meaning of the Political Reform Act.

(7) Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally. If the reasonably foreseeable material financial effect on the public official's economic interest is indistinguishable from the effect on the public generally, he or she does not have a conflict of interest within the meaning of the Political Reform Act. If the reasonably foreseeable material financial effect on the public official's economic interest is distinguishable from the effect on the public generally, he or she has a conflict of interest within the meaning of the Political Reform Act. (See Cal. Code Regs., tit. 2, § 18707.)

(8) Determine if the public official's participation is legally required despite the conflict of interest. (See Cal. Code Regs., tit. 2, § 18708.)

§ 18701.

(a) For purposes of Government Code Section 82048, which defines "public official," and Government Code Section 82019, which defines "designated employee," the following definitions apply:

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority. A committee, board or commission possesses decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

(C) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

(2) “Consultant” means an individual who, pursuant to a contract with a state or local government agency:

(A) Makes a governmental decision whether to:

1. Approve a rate, rule, or regulation;

2. Adopt or enforce a law;

3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;

4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

5. Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

6. Grant agency approval to a plan, design, report, study, or similar item;

7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

(B) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Government Code Section 87302.

(b) For purposes of Government Code Section 87200, the following definitions apply:

(1) “Other public officials who manage public investments” means:

(A) Members of boards and commissions, including pension and retirement boards or commissions, or of committees thereof, who exercise responsibility for the management of public investments;

(B) High-level officers and employees of public agencies who exercise primary responsibility for the management of public investments, such as chief or principal investment officers or chief financial

managers. This category shall not include officers and employees who work under the supervision of the chief or principal investment officers or the chief financial managers; and

(C) Individuals who, pursuant to a contract with a state or local government agency, perform the same or substantially all the same functions that would otherwise be performed by the public officials described in subdivision (b)(1)(B) above.

(2) “Public investments” means the investment of public moneys in real estate, securities, or other economic interests for the production of revenue or other financial return.

(3) “Public moneys” means all moneys belonging to, received by, or held by, the state, or any city, county, town, district, or public agency therein, or by an officer thereof acting in his or her official capacity, and includes the proceeds of all bonds and other evidences of indebtedness, trust funds held by public pension and retirement systems, deferred compensation funds held for investment by public agencies, and public moneys held by a financial institution under a trust indenture to which a public agency is a party.

(4) “Management of public investments” means the following nonministerial functions: directing the investment of public moneys; formulating or approving investment policies; approving or establishing guidelines for asset allocations; or approving investment transactions.

§ 18702.

(a) To determine if a public official is making, participating in making, or using or attempting to use his/her official position to influence a government decision, apply Title 2, California Code of Regulations, 2 Cal. Code Regs. sections 18702.1 through 18702.4, respectively.

(b) Notwithstanding subdivision (a) of this regulation, to determine if a public official who holds an office specified in Government Code section 87200 is making, participating in making, or using or attempting to use his or her official position to influence a governmental decision relating to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.) apply 2 Cal. Code Regs. sections 18702.1(a)(1)–(a)(4), 18702.2, 18702.3, 18702.4, and 18702.5.

§ 18702.1.

(a) A public official “makes a governmental decision,” except as provided in Title 2, California Code of Regulations, section 18702.4, 2 Cal. Code Regs. section 18702.4, when the official, acting within the authority of his or her office or position:

- (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency to any course of action;
- (4) Enters into any contractual agreement on behalf of his or her agency;

(5) Determines not to act, within the meaning of subdivisions (a)(1), (a)(2), (a)(3), or (a)(4), above, unless such determination is made because of his or her financial interest. When the determination not to act occurs because of the official's financial interest, the official's determination may be accompanied by an oral or written disclosure of the financial interest.

(b) When an official with a disqualifying conflict of interest abstains from making a governmental decision in an open session of the agency and the official remains on the dais or in his or her designated seat during deliberations of the governmental decision in which he or she is disqualified, his or her presence shall not be counted toward achieving a quorum.

(c) During a closed meeting of the agency, a disqualified official shall not be present when the decision is considered or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.

(d) Notwithstanding subdivision (a) of this regulation, to determine if a public official who holds an office specified in Government Code section 87200 is making, participating in making, or using or attempting to use his or her official position to influence a governmental decision relating to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.) apply 2 Cal. Code Regs. sections 18702.1(a)(1) – (a)(4), 18702.2, 18702.3, 18702.4, and 18702.5.

§ 18702.2.

A public official “participates in making a governmental decision,” except as provided in Title 2, California Code of Regulations, section 18702.4, when, acting within the authority of his or her position, the official:

(a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A);

(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A).

§ 18702.3.

(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence,

any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

(b) With regard to a governmental decision which is within or before an agency not covered by subsection (a), the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. Such actions include, but are not limited to the use of official stationery.

§ 18702.4.

(a) Making or participating in making a governmental decision shall not include:

(1) Actions of public officials which are solely ministerial, secretarial, manual, or clerical;

(2) Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1); or

(3) Actions by public officials relating to their compensation or the terms or conditions of their employment or contract. In the case of public officials who are "consultants," as defined in Title 2, California Code of Regulations, section 18701(a)(2), this includes actions by consultants relating to the terms or conditions of the contract pursuant to which they provide services to the agency, so long as they are acting in their private capacity.

(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

(B) A business entity wholly owned by the official or members of his or her immediate family.

(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.

(2) Communicates with the general public or the press.

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

(4) Prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before any agency. However, this provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.

(5) Appears before a design or architectural review committee or similar body of which he or she is a member to present drawings or submissions of an architectural, engineering or similar nature which the official has prepared for a client if the following three criteria are met:

(A) The review committee's sole function is to review architectural or engineering plans or designs and to make recommendations in that instance concerning those plans or designs to a planning commission or other agency;

(B) The ordinance or other provision of law requires that the review committee include architects, engineers or persons in related professions, and the official was appointed to the body to fulfill this requirement; and

(C) The official is a sole practitioner.

(c) Academic Decisions

(1) Except as provided in subsection (c)(2), neither disclosure of financial interests nor disqualification is required under Government Code sections 87100, 87302, or any Conflict of Interest Code, in connection with:

(A) Teaching decisions, including the selection by a teacher of books or other educational materials for use within his or her own school or institution, and other decisions incidental to teaching;

(B) Decisions made by a person who has teaching or research responsibilities at an institution of higher education to pursue personally a course of academic study or research, to apply for funds to finance such a project, to allocate financial and material resources for such academic study or research, and all decisions relating to the manner or methodology with which such study or research will be conducted. Provided, however, that the provisions of this subsection (c)(1)(B) shall not apply with respect to any decision made by the person in the exercise of institution- or campus-wide administrative responsibilities respecting the approval or review of any phase of academic research or study conducted at that institution or campus.

(2) Disclosure shall be required under Government Code section 87302 or any Conflict of Interest Code in connection with a decision made by a person or persons at an institution of higher education with principal responsibility for a research project to undertake such research, if it is to be funded or supported, in whole or in part, by a contract or grant (or other funds earmarked by the donor for a specific research project or for a specific researcher) from a nongovernmental entity, but disqualification may not be required under Government Code sections 87100, 87302 or any Conflict of Interest Code in connection with any such decision if the decision is substantively reviewed by an independent committee established within the institution.

§ 18702.5.

(a) Government Code section 87105 and this regulation apply when a public official who holds an office specified in Government Code section 87200 has a financial interest in a decision within the meaning of Government Code section 87100, and the governmental decision relates to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.).

(b) Content & Timing of Identification: The public official shall, following the announcement of the agenda item to be discussed or voted upon but before either the discussion or vote commences, do all of the following:

(1) The public official shall publicly identify:

(A) Each type of economic interest held by the public official which is involved in the decision (i.e. investment, business position, interest in real property, personal financial effect, or the receipt or promise of income or gifts), and

(B) The following details identifying the economic interest(s):

(i) if an investment, the name of the business entity in which each investment is held;

(ii) if a business position, a general description of the business activity in which the business entity is engaged as well as the name of the business entity;

(iii) if real property, the address or another indication of the location of the property, unless the property is the public official's principal or personal residence, in which case, identification that the property is a residence;

(iv) if income or gifts, then identification of the source; and

(v) if personal financial effect, then identification of the expense, liability, asset or income affected.

(2) Form of Identification: If the governmental decision is to be made during an open session of a public meeting, the public identification shall be made orally and shall be made part of the official public record.

(3) Recusal/Leaving the Room: The public official must recuse himself or herself and leave the room after the identification required by subdivisions (b)(1) and (b)(2) of this regulation is made. He or she shall not be counted toward achieving a quorum while the item is discussed.

(c) Special Rules for Closed Session: If the governmental decision is made during a closed session of a public meeting, the public identification may be made orally during the open session before the body goes into closed session and shall be limited to a declaration that his or her recusal is because of a conflict of interest under Government Code section 87100. The declaration shall be made part of the official public record. The public official shall not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.

(d) Exceptions:

(1) Uncontested Matters: The exception from leaving the room granted in Government Code section 87105(a)(3) for a “matter [that] has been placed on the portion of the agenda reserved for uncontested matters” shall mean agenda items on the consent calendar. When the matter in which the public official has a financial interest is on the consent calendar, the public official must comply with subdivisions (b)(1) and (b)(2) of this regulation, and recuse himself or herself from discussing or voting on that matter, but the public official is not required to leave the room during the consent calendar.

(2) Absence: If the public official is absent when the agenda item subject to subdivision (a) of this regulation is considered, then Government Code section 87105 and this regulation impose no public identification duties on the public official for that item at that meeting.

(3) Speaking as a Member of the Public Regarding an Applicable Personal Interest: When a personal interest found in 2 Cal. Code Regs. section 18702.4(b) is present, a public official may speak as a member of the general public if he or she complies with subdivisions (b)(1) and (b)(2) of this regulation, recuses himself or herself from voting on the matter and leaves the dais to speak from the same area as the members of the public. He or she may listen to the public discussion of the matter with the members of the public.

§ 18703.

For purposes of Title 2, Division 6, Chapter 7 of the California Code of Regulations, the term “economic interest” includes the interests defined in Title 2, California Code of Regulations, sections 18703.1 through 18703.5, inclusive.

§ 18703.1.

A public official has an economic interest in a business entity if any of the following are true:

(a) The public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more in the business entity.

(b) The public official is a director, officer, partner, trustee, employee, or holds any position of management in the business entity.

(c) Parent, Subsidiary, Otherwise Related Business Entity. An official has an economic interest in a business entity which is a parent or subsidiary of, or is otherwise related to, a business entity in which the official has one of the interests defined in Government Code section 87103(a), (c) or (d).

(d) Parent, Subsidiary, Otherwise Related Business Entity, defined.

(1) Parent subsidiary. A parent subsidiary relationship exists when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation.

(2) Otherwise related business entity. Business entities, including corporations, partnerships, joint ventures and any other organizations and enterprises operated for profit, which do not have a parent subsidiary relationship are otherwise related if any one of the following three tests is met:

(A) One business entity has a controlling ownership interest in the other business entity.

(B) There is shared management and control between the entities. In determining whether there is shared management and control, consideration should be given to the following factors:

(i) The same person or substantially the same person owns and manages the two entities;

(ii) There are common or commingled funds or assets;

(iii) The business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a regular basis;

(iv) There is otherwise a regular and close working relationship between the entities; or

(C) A controlling owner (50% or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity.

(3) Disclosure of investment interests. An official who holds a reportable investment in one business entity need not disclose the name of any parent, subsidiary or otherwise related business entity on his or her Statement of Economic Interests.

(e) Although a public official may not have an economic interest in a given business entity pursuant to subdivisions (a)-(c) of this section, the public official may nonetheless have an economic interest in the business entity if it is a source of income to him or her. (See 2 Cal. Code Regs. section 18703.3.)

§ 18703.2.

(a) A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more in fair market value.

§ 18703.3.

(a) A public official has an economic interest in any person from whom he or she has received income, including commission income and incentive compensation as defined in this regulation, aggregating five hundred dollars (\$500) within 12 months prior to the time when the relevant governmental decision is made. For purposes of Government Code sections 87100 and 87103(c), a public official's income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income.

(b) Former employers. Source of income, as used in Government Code section 87103(c) and this section, shall not include a former employer if: All income from the employer was received by or accrued to the public official prior to the time he or she became a public official; the income was received in the normal course of the previous employment; and there was no expectation by the public official at the time he or she assumed office of renewed employment with the former employer.

(c) Sources of Commission Income to Brokers, Agents and Salespersons

(1) “Commission income” means gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. Commission income is received when it is paid or credited.

(2) The sources of commission income in a specific sale or similar transaction include for each of the following:

(A) An insurance broker or agent:

(i) The insurance company providing the policy;

(ii) The person purchasing the policy; and

(iii) The brokerage firm, agency, company, or other business entity through which the broker or agent conducts business.

(B) A real estate broker:

(i) The person the broker represents in the transaction;

(ii) If the broker receives a commission from a transaction conducted by an agent working under the broker’s auspices, the person represented by the agent;

(iii) Any brokerage business entity through which the broker conducts business; and

(iv) Any person who receives a finder’s or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.

(C) A real estate agent:

(i) The broker and brokerage business entity under whose auspices the agent works;

(ii) The person the agent represents in the transaction; and

(iii) Any person who receives a finder’s or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.

(D) A travel agent or salesperson:

(i) The airline, hotel, tour operator or other person who provided travel services or accommodations in the transaction;

(ii) The person who purchases or has a contract for travel services or accommodations through the agent or salesperson; and

(iii) The person, travel agent, company, travel agency or other business entity for which the agent or salesperson is an agent.

(E) A stockbroker:

(i) The brokerage business entity through which the broker conducts business; and

(ii) The person who trades the stocks, bonds, securities or other investments through the stockbroker.

(F) A retail or wholesale salesperson:

(i) The person, store or other business entity which provides the salesperson with the product or service to sell and for which the salesperson acts as a representative in the transaction; and

(ii) The person who purchases the product or service.

(3) For purposes of determining whether disqualification is required under the provisions of Government Code sections 87100 and 87103(c), the full gross value of any commission income for a specific sale or similar transaction shall be attributed to each source of income in that sale or transaction.

(d) Sources of Incentive Compensation. "Incentive compensation" means income received by an official who is an employee, over and above salary, which is either ongoing or cumulative, or both, as sales or purchases of goods or services accumulate. Incentive compensation is calculated by a predetermined formula set by the official's employer which correlates to the conduct of the purchaser in direct response to the effort of the official. Incentive compensation does not include: salary; commission income; bonuses for activity not related to sales or marketing, the amount of which is based solely on merit or hours worked over and above a predetermined minimum; and such executive incentive plans as may be based on company performance, provided that the formula for determining the amount of the executive's incentive income does not include a correlation between that amount and increased profits derived from increased business with specific and identifiable clients or customers of the company. Incentive compensation also does not include payments for personal services which are not marketing or sales.

The purchaser is a source of income to the official if all three of the following apply:

(1) The official's employment responsibilities include directing sales or marketing activity toward the purchaser; and

(2) There is direct personal contact between the official and the purchaser intended by the official to generate sales or business; and

(3) There is a direct relationship between the purchasing activity of the purchaser and the amount of the incentive compensation received by the official.

§ 18703.4.

A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating three hundred forty dollars (\$340) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

§ 18703.5.

A public official has an economic interest in his or her personal finances and those of his or her immediate family. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing.

§ 18704.

(a) In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision:

(1) For governmental decisions which affect business entities, sources of income, and sources of gifts--apply Title 2, California Code of Regulations, section 18704.1;

(2) For governmental decisions which affect real property interests--apply Title 2. California Code of Regulations, section 18704.2.

(3) For governmental decisions which affect the personal expenses, income, assets or liabilities of the public official or his or her immediate family (personal financial effect)--apply Title 2, California Code of Regulations, section 18704.5.

§ 18704.1.

(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

(b) If a business entity, source of income, or source of a gift is directly involved in a governmental decision, apply the materiality standards in California Code of Regulations, Title 2, section 18705.1(b), section 18705.3(a), or section 18705.4(a), respectively. If a business entity, source of income, or source of a gift is not directly involved in a governmental decision, apply the materiality standards in California Code of Regulations, Title 2, section 18705.1(c), section 18705.3(b), or section 18705.4(b), respectively.

§ 18704.2.

(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:

(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located “within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision” if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. For purposes of this subdivision, the terms “zoning” and “rezoning” shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.

(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

(4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.

(b) Notwithstanding subdivision (a) above, real property in which a public official has an interest is not directly involved in a governmental decision, but is indirectly involved if:

(1) The decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under Title 2, California Code of Regulations, section 18705.2(b).

(2) The decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage or similar facilities.

(c) Determining the applicable materiality standard.

(1) If the real property in which the public official has an economic interest is directly involved in a governmental decision, apply the materiality standards in Title 2, California Code of Regulations, section 18705.2(a).

(2) If a real property interest is not directly involved in a governmental decision, apply the materiality standards in Title 2, California Code of Regulations, section 18705.2(b).

§ 18704.5.

(a) A public official or his or her immediate family is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.

§ 18705.

(a) In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material:

(1) For governmental decisions which affect economic interests in business entities -apply Title 2, California Code of Regulations, section 18705.1;

(2) For governmental decisions which affect economic interests in real property-apply Title 2, California Code of Regulations, section 18705.2;

(3) For governmental decisions which affect economic interests in sources of income-apply Title 2, California Code of Regulations, section 18705.3;

(4) For governmental decisions which affect economic interests in sources of gifts -apply Title 2, California Code of Regulations, section 18705.4;

(5) For governmental decisions which affect the personal expenses, income, assets or liabilities of the public official or his immediate family (personal financial effect)-apply Title 2, California Code of Regulations, section 18705.5;

(b) General Rule.

(1) Whenever the specific provisions of Title 2, California Code of Regulations, sections 18705.1 through 18705.5, inclusive, cannot be applied, the following general rule shall apply: The financial effect of a governmental decision is material if the decision will have a significant effect on the official or a member of the official's immediate family, or on the source of income, the source of gifts, the business entity, or the real property, which is an economic interest of the official.

(c) Special Rules. Notwithstanding Title 2, California Code of Regulations, sections 18705.1 through 18705.5, inclusive, an official does not have to disqualify himself or herself from a governmental decision if:

(1) Although a conflict of interest would otherwise exist under Title 2, California Code of Regulations, sections 18705.1 through 18705.4, inclusive, and 18706, the decision will have no financial effect on the person or business entity who appears before the official, or on the real property.

§ 18705.1.

(a) Introduction.

(1) If a business entity in which a public official has an economic interest is directly involved in a governmental decision (see 2 Cal. Code Regs., section 18704.1(a)), use the standards in subdivision (b) of this regulation.

(2) If a business entity in which a public official has an economic interest is indirectly involved in a governmental decision (see 2 Cal. Code Regs., section 18704.1(b)), use the standards in subdivision (c) of this regulation.

(b) Directly involved business entities.

(1) General Rule: Unless the exception in subdivision (b)(2) of this regulation applies, the financial effects of a governmental decision on a business entity which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity.

(2) Exception: If the public official's only economic interest in the business entity is an investment interest (see Government Code section 87103(a)), and the public official's investment in the business entity is worth \$25,000 or less, then apply the materiality standards in subdivision (c)(1) of this regulation if the business entity is listed on the Fortune 500, or the materiality standards in subdivision (c)(2) of this regulation if the business entity is listed on the New York Stock Exchange, or if not listed on the New York Stock Exchange, for its most recent fiscal year had earnings before taxes of no less than:

(A) \$2.5 million, or

(B) such other amount described at Rule 102.01C of the New York Stock Exchange's Listed Company Manual (or any superseding rule of the New York Stock Exchange describing its financial standards for initial listing).

(c) Indirectly involved business entities. The following materiality standards apply when a business entity in which a public official has an economic interest is indirectly involved in a governmental decision. If more than one of the following subdivisions is applicable to the business entity in question, apply the subdivision with the highest dollar thresholds.

(1) If the business entity is listed in the Fortune 500, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year of \$10,000,000 or more; or

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500,000 or more; or

(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$10,000,000 or more.

(2) If the business entity is listed on the New York Stock Exchange, or if not listed on the New York Stock Exchange, for its most recent fiscal year had earnings before taxes of no less than \$2.5 million, or such other amount described at Rule 102.01C of the New York Stock Exchange's Listed Company Manual (or any superseding rule of the New York Stock Exchange describing its financial standards for initial listing), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

(A) The governmental decision will result in an increase or decrease to the business entity's gross revenues for a fiscal year in the amount of \$500,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$200,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of assets or liabilities of \$500,000 or more.

(3) If the business entity is listed on either the NASDAQ or American Stock Exchange, or if not so listed, for its most recent fiscal year had: net income of no less than \$500,000 (or such other amount described in the minimum financial requirements for continued listing on the NASDAQ SmallCap market), or earnings before taxes of no less than \$750,000 (or such other amount of earnings before taxes described under initial listing standard 1 of Section 101(a) of the Rules of the American Stock Exchange, or any superseding Section of the Rules of that Exchange), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

(A) The governmental decision will result in an increase or decrease to the business entity's gross revenues for a fiscal year in the amount of \$300,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$100,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of assets or liabilities of \$300,000 or more.

(4) If the business entity is not covered by subdivisions (c)(1)-(3), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.

(d) Terminology. The accounting terms described below are the same as, or not inconsistent with, terms used in Generally Accepted Accounting Principles and Generally Accepted Auditing Standards. Nothing in this subdivision should be construed to incorporate new items not contemplated under Generally Accepted Accounting Principles and Generally Accepted Auditing Standards, nor to exclude any items that might be included in the definitions of these terms under Generally Accepted Accounting Principles and Generally Accepted Auditing Standards.

(1) Assets. As used in this section, "assets" means all property, real and personal, tangible and intangible, which belongs to any business entity. This includes, but is not limited to, cash, securities, merchandise, raw materials, finished goods, operating supplies, and ordinary maintenance material and parts, accounts receivable and notes and loans receivable, and prepaid expenses (such as prepaid insurance, interests, rents, taxes, advertising, and operating supplies).

(A) When a business entity holds a claim over collateral (including real property) as security for a loan made by the business entity, such a claim does not make the collateral (including real property) an "asset" of the business entity, unless the business entity has initiated proceedings to foreclose upon, or acquire the asset based on the debtor's failure to repay the loan. The loan or note secured by the collateral is an asset.

(B) The definition of "assets" also includes intangible assets. Intangible assets, include, but are not limited to, long-lived legal rights and competitive advantages developed or acquired by a business enterprise, patents, copyrights, franchises, trademarks, organizational costs, goodwill, and secret processes.

(2) Earnings Before Taxes: Revenue, less the cost of goods sold and selling, general, and administrative expenses (but not excluding depreciation and amortization expenses); otherwise defined as operating and non-operating profit before the deduction of income taxes. Described variously as EBT, Income Before Income Taxes, or Income Before Provision for Income Taxes.

(3) Expenses: In general, the term refers to the current costs of carrying on an activity.

(4) Gross Revenue: Actual or expected inflows of cash or other assets. "Gross Revenue" is the revenue of a business entity before adjustments or deductions are made for returns and allowances and the costs of goods sold, and prior to any deduction for these and any other expenses.

(5) Liabilities: Obligations of the business entity, liquidation of which is reasonably expected to require the transfer of assets or the creation of other new liabilities. Any financial obligation or cash

expenditures that must be made by the business entity at a specific time to satisfy the contractual terms of such an obligation.

(6) Net Income: A business entity's total earnings; otherwise defined as revenues adjusted for the costs of doing business, depreciation, interest, taxes, and other expenses. This amount is usually found at the bottom of a business entity's Profit and Loss statement. Also described as Net Profit.

(e) Financial statements. In complying with this regulation, public officials may rely on the most recent independently audited financial statements of the business entity so long as those statements are reflective of the current condition of the business entity. Financial statements are not considered "reflective of the current condition of the business entity" where:

(1) The most recent independently audited financial statements of the business entity are for a fiscal year ending more than twenty-four months prior to the date of the governmental decision.

(2) The most recent audit of the financial statements resulted in an adverse opinion, was issued with a disclaimer, or was otherwise qualified in such a manner that the statement of assets, liabilities, expenses, or gross revenues is questioned in the audit report, or

(3) There has been a subsequent event, intervening between the date that the financial statement was created and the date of the decision of the public official, that makes the statement no longer representative, including, but not limited to, business reorganizations.

§ 18705.3.

(a) Directly involved sources of income. Any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official's agency, is deemed material.

(b) Indirectly involved sources of income.

(1) Sources of income which are business entities. If the source of income is a business entity, apply the materiality standards stated in Title 2, California Code of Regulations, section 18705.1(c).

(2) Sources of income which are non-profit entities, including governmental entities. The effect of a decision is material as to a nonprofit entity which is a source of income to the official if any of the following applies:

(A) For an entity whose gross annual receipts are \$400,000,000 or more, the effect of the decision will be any of the following:

(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$1,000,000 or more; or

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$250,000 or more; or

(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$1,000,000 or more.

(B) For an entity whose gross annual receipts are more than \$100,000,000 but less than \$400,000,000, the effect of the decision will be any of the following:

(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$400,000 or more; or

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$100,000 or more; or

(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$400,000 or more.

(C) For an entity whose gross annual receipts are more than \$10,000,000, but less than or equal to \$100,000,000 the effect of the decision will be any of the following:

(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$200,000 or more.

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$50,000 or more.

(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$200,000 or more.

(D) For an entity whose gross annual receipts are more than \$1,000,000, but less than or equal to \$10,000,000 the effect of the decision will be any of the following:

(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$100,000 or more.

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$25,000 or more.

(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$100,000 or more.

(E) For an entity whose gross annual receipts are more than \$100,000 but less than or equal to \$1,000,000 the effect of the decision will be any of the following:

(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$50,000 or more.

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$12,500 or more.

(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$50,000 or more.

(F) For an entity whose gross annual receipts are \$100,000 or less, the effect of the decision will be any of the following:

(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$10,000 or more.

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more.

(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$10,000 or more.

(3) Sources of income who are individuals. The effect of a decision is material as to an individual who is a source of income to an official if any of the following applies:

(A) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

(B) The decision will affect the individual's real property interest in a manner that is considered material under Title 2, California Code of Regulations, sections 18705.2(b).

(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.

§ 18705.4.

(a) Directly involved sources of gifts. Any reasonably foreseeable financial effect on a person who is a source of a gift to a public official, and which person is directly involved in a decision before the official's agency, is deemed material.

(b) Indirectly involved sources of gifts.

(1) Sources of gifts which are indirectly involved business entities. If the source of a gift is a business entity, apply the materiality standards stated in 2 Cal. Code Regs. section 18705.1(c).

(2) Sources of gifts which are indirectly involved nonprofit entities or government agencies. If the source of a gift is a nonprofit entity or a government agency, apply the materiality standards stated in 2 Cal. Code Regs. section 18705.3(b)(2).

(3) Sources of gifts who are indirectly involved individuals. If the source of a gift is an individual, apply the materiality standards stated in 2 Cal. Code Regs. section 18705.3(b)(3).

§ 18705.5.

(a) A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.

(b) The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position.

§ 18706.

(a) A material financial effect on an economic interest is reasonably foreseeable, within the meaning of Government Code section 87103, if it is substantially likely that one or more of the materiality standards (see Cal. Code Regs., tit. 2, §§ 18704, 18705) applicable to that economic interest will be met as a result of the governmental decision.

(b) In determining whether a governmental decision will have a reasonably foreseeable material financial effect on an economic interest as defined in subdivision (a) above, the following factors should be considered. These factors are not intended to be an exclusive list of the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable, but are included as general guidelines:

(1) The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction;

(2) The market share held by the official or the official's source of income in the jurisdiction;

(3) The extent to which the official or the official's source of income has competition for business in the jurisdiction;

(4) The scope of the governmental decision in question; and

(5) The extent to which the occurrence of the material financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

(c) Possession of a real estate sales or brokerage license, or any other professional license, without regard to the official's business activity or likely business activity, does not in itself make a material financial effect on the official's economic interest reasonably foreseeable.

§ 18707.

(a) Introduction.

Notwithstanding a determination that the reasonably foreseeable financial effect of a governmental decision on a public official's economic interests is material, a public official does not have a disqualifying conflict of interest in the governmental decision if the governmental decision affects the public official's economic interests in a manner which is indistinguishable from the manner in which the decision will affect the public generally as set forth in Title 2, California Code of Regulations, sections 18707.1 - 18707.9.

(b) Steps to Determine Application of Public Generally. To determine if the effect of a decision is not distinguishable from the effect on the public generally as set forth in subdivision (a) of this regulation, apply Steps One through Four:

(1) Step One: Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.

(2) Step Two: For each person or real property identified in Step One, determine the applicable "significant segment" rule according to the provisions of Title 2, California Code of Regulations, section 18707.1(b).

(3) Step Three: Determine if the significant segment is affected by the governmental decision as set forth in the applicable "significant segment" rule. If the answer is "no," then the analysis ends because the first prong of a two-part test set forth in Title 2, California Code of Regulations, section 18707.1(b) is not met, and the public official cannot participate in the governmental decision. If the answer is "yes," proceed to Step Four.

(4) Step Four: Following the provisions of Title 2, California Code of Regulations, section 18707.1(b)(2), determine if the person or real property identified in Step One is affected by the governmental decision in "substantially the same manner" as other persons or real property in the applicable significant segment. If the answer is "yes" as to each person or real property identified in Step One, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. If the answer is "no" as to any person or real property identified in Step One, the public official may not participate in the governmental decision unless one of the special rules set forth in Title 2, California Code of Regulations, sections 18707.2 through 18707.9 applies to each person or real property triggering the conflict of interest.

(c) For purposes of Government Code section 87102.5 (Members of the Legislature) and Government Code section 87102.8 (elected state officers), Government Code section 87102.6(b)(2) applies.

§ 18707.1.

(a) Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply.

(b) Significant Segments and Indistinguishable Effects.

(1) Significant Segment. The governmental decision will affect a “significant segment” of the public generally if any of the following are affected as set forth below:

(A) Individuals. For decisions that affect the personal expenses, income, assets, or liabilities of a public official or a member of his or her immediate family, or that affect an individual who is a source of income or a source of gifts to a public official, the decision also affects:

(i) Ten percent or more of the population in the jurisdiction of the official’s agency or the district the official represents; or

(ii) 5,000 individuals who are residents of the jurisdiction.

(B) Real Property. For decisions that affect a public official’s real property interest, the decision also affects:

(i) Ten percent or more of all property owners or all homeowners in the jurisdiction of the official’s agency or the district the official represents; or

(ii) 5,000 property owners or homeowners in the jurisdiction of the official’s agency.

(C) Business Entities. For decisions that affect a business entity in which a public official has an economic interest the decision also affects 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession. For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity.

(D) Governmental Entities. For decisions that affect a federal, state or local government entity in which the public official has an economic interest, the decision will affect all members of the public under the jurisdiction of that governmental entity.

(E) Exceptional Circumstances. The decision will affect a segment of the population which does not meet any of the standards in subdivisions (b)(1)(A) through (b)(1)(D), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.

(2) Substantially the Same Manner: The governmental decision will affect a public official’s economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation.

§ 18707.2.

The financial effect of a governmental decision on the official’s economic interest is indistinguishable from the decision’s effect on the public generally if any of the following apply:

(a) The decision is to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions which are applied on a proportional basis on the official's economic interest and on a significant segment of the jurisdiction, as defined in 2 Cal. Code of Regulations, section 18707.1(b).

(b) The decision is made by the governing board of a landowner voting district and affects the official's economic interests and ten percent of the landowners or water users subject to the jurisdiction of the district in proportion to their real property interests or by the same percentage or on an "across-the-board" basis for all classes.

(c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or "across-the-board" basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency.

§ 18707.3.

(a) The effect of a governmental decision on the principal residence of a public official is not distinguishable from the effect on the public generally where all of the following conditions are met:

(1) The public official's agency has jurisdiction over a population of 25,000 or less.

(2) The decision does not have a direct effect (as provided in Title 2, California Code of Regulations, section 18704.2) on the real property that serves as the public official's principal residence.

(3) The real property that serves as the public official's principal residence is more than 500 feet from the boundaries of the property which is the subject of the decision.

(4) There are at least 100 properties under separate ownership which are within a 2,500 foot radius of the boundaries of the property which is the subject of the decision.

(5) The principal residence is located on a parcel of land not more than one acre in size, or which, under the zoning and subdivision regulations of the jurisdiction in which it is located, cannot be further subdivided.

(6) The effect of the decision on the official's real property interest will be substantially the same as the effect of the decision on the majority of the residential properties which are beyond 500 feet, but within 2,500 feet of the boundaries of the real property that is the subject of the decision.

(b) For purposes of this regulation, "principal residence" means the domicile of a person, in which the person's habitation is fixed, wherein the person has the intention of remaining, and to which the person, whenever he or she is absent, has the intention of returning. At any given time, a person may have only one principal residence. With respect to units in condominium complexes, planned unit developments, and similar residences, "the real property that serves as the public official's principal residence" and "principal residence," as used in this regulation, means the unit or space in which the official has a separate ownership interest.

§ 18707.4.

(a) For the purposes of Government Code section 87103, the “public generally” exception applies to appointed members of boards and commissions who are appointed to represent a specific economic interest, as specified in section 87103(a) through (d), if all of the following apply:

(1) The statute, ordinance, or other provision of law which creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.

(2) The member is required to have the economic interest the member represents.

(3) The board’s or commission’s decision does not have a reasonably foreseeable material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.

(4) The decision of the board or commission will financially affect the member’s economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent. For purposes of this regulation, a significant segment constitutes fifty percent of the persons the member was appointed to represent.

(b) In the absence of an express finding and declaration or requirement of the types described in 2 Cal. Code Regs. section 18707.4(a)(1) and (2), the “public generally” exception only applies if such a finding and declaration or requirement is implicit, taking into account the language of the statute, ordinance, or other provision of law creating or authorizing the creation of the board or commission, the nature and purposes of the program, any applicable legislative history, and any other relevant circumstance.

§ 18707.5.

(a) Significant Segment Test

(a)(1) For purposes of Government Code section 87103.5(a), as to a business entity located in a jurisdiction with a population of more than 10,000 or which is located in a county with more than 350 retail businesses, the retail customers of a business entity constitute a significant segment of the public generally if either of the following is true: applies:

(1)(A) The retail customers of the business entity during the preceding 12 months are sufficient in number to equal 10 percent or more of the population or households of the jurisdiction; or

(2)(B) The retail customers of the business entity during the preceding 12 months number at least ten thousand 10,000.

(2) For purposes of Government Code section 87103.5(b), as to a business entity located in a jurisdiction with a population of 10,000 or less which is located in a county with 350 or fewer retail businesses, the retail customers constitute a significant segment of the public generally if the retail customers of the business entity during the preceding 12 months are sufficient in number to equal 10 percent or more of the population or households of the jurisdiction.

(3) For purposes of this subdivision, a customer of a retail business entity is each separate and distinct purchaser of goods or services, whether an individual, household, business or other entity. If records are not maintained by customer name, a good faith estimate shall be made to determine what percentage of sales transactions represent multiple transactions by repeat customers. The total number of sales transactions shall then be reduced by the estimated percentage of repeat customers to yield the number of customers for purposes of applying this subdivision.

(b) Indistinguishable Income Test

(b)(1) For purposes of Government Code section 87103.5(a), as to a business entity located in a jurisdiction with a population of more than 10,000 or which is located in a county with more than 350 retail businesses, the amount of income received by a business entity from a retail customer is not distinguishable from the amount of income received from its other retail customers if the amount spent by the customer in question during the preceding 12 months is less than one-tenth of 1 percent of the gross sales revenues of the retail business entity for the preceding fiscal year. is less than one-tenth of one percent of the gross sales revenues that the business entity earned during the 12 months prior to the time the decision is made.

(2) For purposes of Government Code section 87103.5(b), as to a business entity located in a jurisdiction with a population of 10,000 or less which is located in a county with 350 or fewer retail businesses, the amount of income received from a retail customer is not distinguishable from the amount of income received from its other retail customers if the amount spent by the customer in question does not exceed one percent of the gross sales revenues that the business entity earned during the 12 months prior to the time the decision is made.

(c) For purposes of Government Code section 87100, an official who owns 10 percent or more of a retail business entity, which meets whose retail customers meet the criteria in either subdivision (a)(1)(A), or (a)(2)(1)(B) or (a)(2), does not “have reason to know” that a decision will affect a source of income to the retail business entity when either of the following applies:

(1) If all of the following are true:

(A) The customer does not have a charge account or open book account with the retail business;

(B) The retail business does not maintain records for noncharge customer transactions by customer name or other method for tracking transactions which would provide the customer name; and

(C) The fact that the person is a customer is not personally known to the official; or

(2) If all of the following are true:

(A) The accounts and books of the retail business entity are maintained by someone other than the official or a member of the official’s immediate family; and

(B) The fact that the person is a customer is not personally known to the official.

(d) For purposes of subdivision (c), a credit card transaction utilizing a credit card not issued by the retail business entity is considered a “noncharge customer transaction.”

(e) Subdivision (c) shall not be utilized in determining whether an official “knows” of a financial interest in a decision within the meaning of Government Code section 87100. When such knowledge exists, or the fact that a person is a source of income is brought to the attention of the official prior to the governmental decision, the provisions of subdivision (c) shall have no effect on the official’s duty to disqualify.

§ 18707.6.

Notwithstanding Title 2, California Code of Regulations, sections 18707 through 18707.5, inclusive, the financial effect of a governmental decision on an official is indistinguishable from its financial effect on the public generally if both of the following apply:

(a) The decision will affect an economic interest of the official, other than an economic interest as defined in section 87103(e), in substantially the same manner as other persons subject to a state of emergency, proclaimed by the Governor pursuant to Government Code section 8625, or proclaimed by the governing body of a city or county.

(b) The decision is required to mitigate against the effects directly arising out of the emergency, and strict adherence to the Act will prevent, hinder, or delay the mitigation of the effects of the emergency.

§ 18707.7.

Where a decision will affect an industry, trade, or profession in substantially the same manner as the decision will affect an official’s economic interest, the industry, trade, or profession constitutes a “significant segment” of the jurisdiction only as set forth below:

(a) In the case of an elected state officer, an industry, trade, or profession constitutes a significant segment of the public generally, as set forth in section 87102.6 of the Government Code.

(b) In the case of any other official, an industry, trade, or profession constitutes a significant segment of the public generally if that industry, trade, or profession is a predominant industry, trade, or profession in the official’s jurisdiction or in the district represented by the official. An industry, trade, or profession that constitutes fifty percent or more of business entities in the jurisdiction of the official’s agency or the district the official represents is a “predominant” industry, trade, or profession for purposes of this regulation. For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity.

§ 18707.9.

(a) The effect of a governmental decision on a public official’s real property interests is indistinguishable from the effect on the public generally if 5,000 or ten percent or more of all property owners or all homeowners in the jurisdiction of the official’s agency or the district the official represents are affected by the decision and the official owns three or fewer residential property units.

A public official's principal residence, as defined in Title 2, California Code of Regulations, section 18707.3(b), does not count as a unit for purposes of this subdivision.

(b) The effect of a governmental decision on any of a public official's economic interest (including real property and business interests) is indistinguishable from the effect on the public generally if all of the following apply:

(1) The decision is to establish, eliminate, amend, or otherwise affect the respective rights or liabilities of tenants and owners of residential property pursuant to a resolution, rule, ordinance, or other law of general application;

(2) No economic interest of the public official other than one created by ownership of residential real property, or the rental of that property, is analyzed under this regulation;

(3) The official's economic interests are not directly involved in the decision (as provided in Title 2, California Code of Regulations, sections 18704.1, 18704.2(a), and 18705.1);

(4) The decision affects at least ten percent of the residential property units in the jurisdiction of the public official or district he or she represents; and

(5) The decision will affect the official's economic interests in substantially the same manner as it will affect other residential property owners or owners of residential rental property. A public official will be affected in substantially the same manner for purposes of this subdivision if the decision will be applied on a proportional or "across-the-board" basis on the official's economic interests as on other residential property owners or other owners of residential rental property affected by the decision.

§ 18708.

(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

(b) Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she shall state the existence of the potential conflict as follows:

(1) The public official shall disclose the existence of the conflict and describe with particularity the nature of the economic interest. "Particularity" as used in this regulation shall be satisfied if the official discloses:

(A) whether the conflict involves an investment, business position, interest in real property, or the receipt of income, loans or gifts;

(B) if the interest is an investment, the name of the business entity in which each investment is held; if the interest is a business position, a general description of the business activity in which the business entity is engaged; if the interest is real property, the address or another indication of the

location of the property, unless the property is the official's principal or personal residence, in which case the official shall disclose this fact.

For income, loans or gifts, the official shall disclose the person or entity that is the source.

(2) The public official or another officer or employee of the agency shall give a summary description of the circumstances under which he or she believes the conflict may arise.

(3) Either the public official or another officer or employee of the agency shall disclose the legal basis for concluding that there is no alternative source of decision.

(4) The disclosures required by this regulation shall be made in the following manner:

(A) If the governmental decision is made during an open session of a public meeting, the disclosures shall be made orally before the decision is made, by either the public official or by another officer or employee of the agency. The information contained in the disclosures shall be made part of the official public record either as a part of the minutes of the meeting or as a writing filed with the agency. The writing shall be prepared by the public official and/or any officer or employee and shall be placed in a public file of the agency within 30 days after the meeting; or

(B) If the governmental decision is made during a closed session of a public meeting, the disclosures shall be made orally during the open session either before the body goes into closed session or immediately after the closed session. The information contained in the disclosures shall be made part of the official public record either as a part of the minutes of the meeting or as a writing filed with the agency. The writing shall be prepared by the public official and/or any officer or employee and shall be placed in a public file of the agency within 30 days after the meeting; or

(C) If the government decision is made or participated in other than during the open or closed session of a public meeting, the disclosures shall be made in writing and made part of the official public record, either by the public official and/or by another officer or employee of the agency. The writing shall be filed with the public official's appointing authority or supervisor and shall be placed in a public file within 30 days after the public official makes or participates in the decision. Where the public official has no appointing authority or supervisor, the disclosure(s) shall be made in writing and filed with the agency official who maintains the records of the agency's statements of economic interests, or other designated office for the maintenance of such disclosures, within 30 days of the making of or participating in the decision.

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code section 87100, whether or not such other members are actually present at the time of the disqualification.

(3) Require participation by the smallest number of officials with a conflict that are “legally required” in order for the decision to be made. A random means of selection may be used to select only the number of officials needed. When an official is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists.

(d) For purposes of this section, a “quorum” shall constitute the minimum number of members required to conduct business and when the vote of a supermajority is required to adopt an item, the “quorum” shall be that minimum number of members needed for that adoption.

APPENDIX D

Government Code Sections 89501, 89502, 89503, and 89506

§ 89501.

(a) For purposes of this chapter, “honorarium” means, except as provided in subdivision (b), any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.

(b) The term “honorarium” does not include:

(1) Earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches. The commission shall adopt regulations to implement this subdivision.

(2) Any honorarium which is not used and, within 30 days after receipt, is either returned to the donor or delivered to the State Controller for donation to the General Fund, or in the case of a public official for local government agency, delivered to his or her agency for donation to an equivalent fund, without being claimed as a deduction from income for tax purposes.

(c) Section 89506 shall apply to all payments, advances, or reimbursements for travel and related lodging and subsistence.

§ 89502.

(a) No elected state officer, elected officer of a local government agency, or other individual specified in Section 87200 shall accept any honorarium.

(b) (1) No candidate for elective state office, for judicial office, or for elective office in a local government agency shall accept any honorarium. A person shall be deemed a candidate for purposes of this subdivision when the person has filed a statement of organization as a committee for election to a state or local office, a declaration of intent, or a declaration of candidacy, whichever occurs first. A person shall not be deemed a candidate for purposes of this subdivision after he or she is sworn into the elective office, or, if the person lost the election after the person has terminated his or her

campaign statement filing obligations for that office pursuant to Section 84214 or after certification of the election results, whichever is earlier.

(2) Paragraph (1) shall not apply to any person who is a candidate as described in paragraph (1) for judicial office on or before December 31, 1996.

(c) No member of a state board or commission and no designated employee of a state or local government agency shall accept an honorarium from any source if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.

(d) This section shall not apply to a person in his or her capacity as judge. This section shall not apply to a person in his or her capacity as a part-time member of the governing board of any public institution of higher education unless that position is an elective office.

§ 89503.

(a) No elected state officer, elected officer of a local government agency, or other individual specified in Section 87200 shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars (\$250).

(b) (1) No candidate for elective state office, for judicial office, or for elective office in a local government agency shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars (\$250). A person shall be deemed a candidate for purposes of this subdivision when the person has filed a statement of organization as a committee for election to a state or local office, a declaration of intent, or a declaration of candidacy, whichever occurs first. A person shall not be deemed a candidate for purposes of this subdivision after he or she is sworn into the elective office, or, if the person lost the election, after the person has terminated his or her campaign statement filing obligations for that office pursuant to Section 84214 or after certification of the election results, whichever is earlier.

(2) Paragraph (1) shall not apply to any person who is a candidate as described in paragraph (1) for judicial office on or before December 31, 1996.

(c) No member of a state board or commission or designated employee of a state or local government agency shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars (\$250) if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.

(d) This section shall not apply to a person in his or her capacity as judge. This section shall not apply to a person in his or her capacity as a part-time member of the governing board of any public institution of higher education unless that position is an elective office.

(e) This section shall not prohibit or limit the following:

(1) Payments, advances, or reimbursements for travel and related lodging and subsistence permitted by Section 89506.

(2) Wedding gifts and gifts exchanged between individuals on birthdays, holidays, and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value.

(f) Beginning on January 1, 1993, the commission shall adjust the gift limitation in this section on January 1 of each odd-numbered year to reflect changes in the Consumer Price Index, rounded to the nearest ten dollars (\$10).

(g) The limitations in this section are in addition to the limitations on gifts in Section 86203.

§ 89506.

(a) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence that is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, are not prohibited or limited by this chapter if either of the following apply:

(1) The travel is in connection with a speech given by the elected state officer, local elected officeholder, candidate for elected state office or local elected office, an individual specified in Section 87200, member of a state board or commission, or designated employee of a state or local government agency, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

(b) Gifts of travel not described in subdivision (a) are subject to the limits in Section 89503.

(c) Subdivision (a) applies only to travel that is reported on the recipient's statement of economic interests.

(d) For purposes of this section, a gift of travel does not include any of the following:

(1) Travel that is paid for from campaign funds, as permitted by Article 4 (commencing with Section 89510), or that is a contribution.

(2) Travel that is provided by the agency of a local elected officeholder, an elected state officer, member of a state board or commission, an individual specified in Section 87200, or a designated employee.

(3) Travel that is reasonably necessary in connection with a bona fide business, trade, or profession and that satisfies the criteria for federal income tax deduction for business expenses in Sections 162 and 274 of the Internal Revenue Code, unless the sole or predominant activity of the business, trade, or profession is making speeches.

(4) Travel that is excluded from the definition of a gift by any other provision of this title.

(e) This section does not apply to payments, advances, or reimbursements for travel and related lodging and subsistence permitted or limited by Section 170.9 of the Code of Civil Procedure.

APPENDIX E

Government Code Section 84308

§ 84308.

(a) The definitions set forth in this subdivision shall govern the interpretation of this section.

(1) “Party” means any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.

(2) “Participant” means any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7. A person actively supports or opposes a particular decision in a proceeding if he or she lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.

(3) “Agency” means an agency as defined in Section 82003 except that it does not include the courts or any agency in the judicial branch of government, local governmental agencies whose members are directly elected by the voters, the Legislature, the Board of Equalization, or constitutional officers. However, this section applies to any person who is a member of an exempted agency but is acting as a voting member of another agency.

(4) “Officer” means any elected or appointed officer of an agency, any alternate to an elected or appointed officer of an agency, and any candidate for elective office in an agency.

(5) “License, permit, or other entitlement for use” means all business, professional, trade and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises.

(6) “Contribution” includes contributions to candidates and committees in federal, state, or local elections.

(b) No officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250) from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer knows or has reason to know that the participant has a financial interest, as that term is used in Article 1 (commencing with Section 87100) of Chapter 7. This prohibition shall apply regardless

of whether the officer accepts, solicits, or directs the contribution for himself or herself, or on behalf of any other officer, or on behalf of any candidate for office or on behalf of any committee.

(c) Prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars (\$250) from a party or from any participant shall disclose that fact on the record of the proceeding. No officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars (\$250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision, as that term is described with respect to public officials in Article 1 (commencing with Section 87100) of Chapter 7.

If an officer receives a contribution which would otherwise require disqualification under this section, returns the contribution within 30 days from the time he or she knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, he or she shall be permitted to participate in the proceeding.

(d) A party to a proceeding before an agency involving a license, permit, or other entitlement for use shall disclose on the record of the proceeding any contribution in an amount of more than two hundred fifty dollars (\$250) made within the preceding 12 months by the party, or his or her agent, to any officer of the agency. No party, or his or her agent, to a proceeding involving a license, permit, or other entitlement for use pending before any agency and no participant, or his or her agent, in the proceeding shall make a contribution of more than two hundred fifty dollars (\$250) to any officer of that agency during the proceeding and for three months following the date a final decision is rendered by the agency in the proceeding. When a closed corporation is a party to, or a participant in, a proceeding involving a license, permit, or other entitlement for use pending before an agency, the majority shareholder is subject to the disclosure and prohibition requirements specified in subdivisions (b), (c), and this subdivision.

(e) Nothing in this section shall be construed to imply that any contribution subject to being reported under this title shall not be so reported.

APPENDIX F

Government Code Sections 87400,
87401, 87402, 87403, 87404, 87405, 87406, 87407

§ 87400.

Unless the contrary is stated or clearly appears from the context, the definitions set forth in this section shall govern the interpretation of this article.

(a) “State administrative agency” means every state office, department, division, bureau, board and commission, but does not include the Legislature, the courts or any agency in the judicial branch of government.

(b) “State administrative official” means every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.

(c) “Judicial, quasi-judicial or other proceeding” means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

(d) “Participated” means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.

§ 87401.

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

§ 87402.

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

§ 87403.

The prohibitions contained in Sections 87401 and 87402 shall not apply:

(a) To prevent a former state administrative official from making or providing a statement, which is based on the former state administrative official’s own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received other than that regularly provided for by law or regulation for witnesses; or

(b) To communications made solely for the purpose of furnishing information by a former state administrative official if the court or state administrative agency to which the communication is directed makes findings in writing that:

(1) The former state administrative official has outstanding and otherwise unavailable qualifications;

(2) The former state administrative official is acting with respect to a particular matter which requires such qualifications; and

(3) The public interest would be served by the participation of the former state administrative official; or

(c) With respect to appearances or communications in a proceeding in which a court or state administrative agency has issued a final order, decree, decision or judgment but has retained jurisdiction if the state administrative agency of former employment gives its consent by determining that:

(1) At least five years have elapsed since the termination of the former state administrative official's employment or term of office; and

(2) The public interest would not be harmed.

§ 87404.

Upon the petition of any interested person or party, the court or the presiding or other officer, including but not limited to a hearing officer serving pursuant to Section 11512 of the Government Code, in any judicial, quasi-judicial or other proceeding, including but not limited to any proceeding pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code may, after notice and an opportunity for a hearing, exclude any person found to be in violation of this article from further participation, or from assisting or counseling any other participant, in the proceeding then pending before such court or presiding or other officer.

§ 87405.

The requirements imposed by this article shall not apply to any person who left government service prior to the effective date of this article except that any such person who returns to government service on or after the effective date of this article shall thereafter be covered thereby.

§ 87406.

(a) This section shall be known, and may be cited, as the Milton Marks Postgovernment Employment Restrictions Act of 1990.

(b) No Member of the Legislature, for a period of one year after leaving office, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance, or by making any oral or written communication, before the Legislature, any committee or subcommittee thereof, any present Member of the Legislature, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing legislative action.

(c) No elected state officer, other than a Member of the Legislature, for a period of one year after leaving office, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or any officer or employee thereof, if the appearance or communication is for the purpose of influencing administrative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this subdivision, an appearance before a "state administrative agency" does not include an appearance in a court of law, before an administrative law judge, or before the Workers' Compensation Appeals Board.

(d) (1) No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Workers' Compensation Appeals Board. The prohibition of this paragraph shall only apply to designated employees employed by a state administrative agency on or after January 7, 1991.

(2) For purposes of paragraph (1), a state administrative agency of a designated employee of the Governor's office includes any state administrative agency subject to the direction and control of the Governor.

(e) The prohibitions contained in subdivisions (b), (c), and (d) shall not apply to any individual subject to this section who is or becomes any of the following:

(1) An officer or employee of another state agency, board, or commission if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission.

(2) An official holding an elective office of a local government agency if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the local government agency.

(f) This section shall become operative on January 1, 1991, but only if Senate Constitutional Amendment No. 32 of the 1989-90 Regular Session is approved by the voters. With respect to Members of the Legislature whose current term of office on January 1, 1991, began in December 1988, this section shall not apply until January 1, 1993.

§ 87407.

No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.

APPENDIX G

Government Code Sections 1090-1097

§ 1090.

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

As used in this article, “district” means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

§ 1090.1.

No officer or employee of the State nor any Member of the Legislature shall accept any commission for the placement of insurance on behalf of the State.

§ 1091.

(a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, “remote interest” means any of the following:

(1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

(2) That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

For purposes of this paragraph, time of employment with the contracting party by the officer shall be counted in computing the three-year period specified in this paragraph even though the

contracting party has been converted from one form of business organization to a different form of business organization within three years of the initial taking of office by the officer. Time of employment in that case shall be counted only if, after the transfer or change in organization, the real or ultimate ownership of the contracting party is the same or substantially similar to that which existed before the transfer or change in organization. For purposes of this paragraph, stockholders, bondholders, partners, or other persons holding an interest in the contracting party are regarded as having the “real or ultimate ownership” of the contracting party.

(3) That of an employee or agent of the contracting party, if all of the following conditions are met:

(A) The agency of which the person is an officer is a local public agency located in a county with a population of less than 4,000,000.

(B) The contract is competitively bid and is not for personal services.

(C) The employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party.

(D) The contracting party has 10 or more other employees.

(E) The employee or agent did not directly participate in formulating the bid of the contracting party.

(F) The contracting party is the lowest responsible bidder.

(4) That of a parent in the earnings of his or her minor child for personal services.

(5) That of a landlord or tenant of the contracting party.

(6) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm that renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(7) That of a member of a nonprofit corporation formed under the Food and Agricultural Code or a nonprofit corporation formed under the Corporations Code for the sole purpose of engaging in the merchandising of agricultural products or the supplying of water.

(8) That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.

(9) That of a person subject to the provisions of Section 1090 in any contract or agreement entered into pursuant to the provisions of the California Land Conservation Act of 1965.

(10) Except as provided in subdivision (b) of Section 1091.5, that of a director of or a person having an ownership interest of 10 percent or more in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor or creditor.

(11) That of an engineer, geologist, or architect employed by a consulting engineering or architectural firm. This paragraph applies only to an employee of a consulting firm who does not serve in a primary management capacity, and does not apply to an officer or director of a consulting firm.

(12) That of an elected officer otherwise subject to Section 1090, in any housing assistance payment contract entered into pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. Sec. 1437f) as amended, provided that the housing assistance payment contract was in existence before Section 1090 became applicable to the officer and will be renewed or extended only as to the existing tenant, or, in a jurisdiction in which the rental vacancy rate is less than 5 percent, as to new tenants in a unit previously under a Section 8 contract. This section applies to any person who became a public official on or after November 1, 1986.

(13) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity.

(14) That of a person owning less than 3 percent of the shares of a contracting party that is a for-profit corporation, provided that the ownership of the shares derived from the person's employment with that corporation.

(c) This section is not applicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which he or she is a member to enter into the contract.

(d) The willful failure of an officer to disclose the fact of his or her interest in a contract pursuant to this section is punishable as provided in Section 1097. That violation does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

§ 1091.1.

The prohibition against an interest in contracts provided by this article or any other provision of law shall not be deemed to prohibit any public officer or member of any public board or commission from subdividing lands owned by him or in which he has an interest and which subdivision of lands is effected under the provisions of Division 2 (commencing with Section 66410) of Title 7 of the Government Code or any local ordinance concerning subdivisions; provided, that (a) said officer or member of such board or commission shall first fully disclose the nature of his interest in any such lands to the legislative body having jurisdiction over the subdivision thereof, and (b) said officer or member of such board or commission shall not cast his vote upon any matter or contract concerning said subdivision in any manner whatever.

§ 1091.2.

Section 1090 shall not apply to any contract or grant made by local workforce investment boards created pursuant to the federal Workforce Investment Act of 1998 except where both of the following conditions are met:

- (a) The contract or grant directly relates to services to be provided by any member of a local workforce investment board or the entity the member represents or financially benefits the member or the entity he or she represents.
- (b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.

§ 1091.3.

Section 1090 shall not apply to any contract or grant made by a county children and families commission created pursuant to the California Children and Families Act of 1998 (Division 108 (commencing with Section 130100) of the Health and Safety Code), except where both of the following conditions are met:

- (a) The contract or grant directly relates to services to be provided by any member of a county children and families commission or the entity the member represents or financially benefits the member or the entity he or she represents.
- (b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.

§ 1091.4.

(a) As used in Section 1091, “remote interest” also includes a person who has a financial interest in a contract, if all of the following conditions are met:

(1) The agency of which the person is a board member is a special district serving a population of less than 5,000 that is a landowner voter district, as defined in Section 56050, that does not distribute water for any domestic use.

(2) The contract is for either of the following:

(A) The maintenance or repair of the district’s property or facilities provided that the need for maintenance or repair services has been widely advertised. The contract will result in materially less expense to the district than the expense that would have resulted under reasonably available alternatives and review of those alternatives is documented in records available for public inspection.

(B) The acquisition of property that the governing board of the district has determined is necessary for the district to carry out its functions at a price not exceeding the value of the property, as determined in a record available for public inspection by an appraiser who is a member of a recognized organization of appraisers.

(3) The person did not participate in the formulation of the contract on behalf of the district.

(4) At a public meeting, the governing body of the district, after review of written documentation, determines that the property acquisition or maintenance and repair services cannot otherwise be obtained at a reasonable price, that the contract is in the best interests of the district, and adopts a resolution stating why the contract is necessary and in the best interests of the district.

(b) If a party to any proceeding challenges any fact or matter required by paragraph (2), (3), or (4) of subdivision (a) to qualify as a remote interest under subdivision (a), the district shall bear the burden of proving this fact or matter.

§ 1091.5.

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

(2) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duty.

(3) That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the board.

(4) That of a landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.

(5) That of a tenant in a public housing authority created pursuant to Part 2 (commencing with Section 34200) of Division 24 of the Health and Safety Code in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 (commencing with Section 34100) of Division 24 of the Health and Safety Code.

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

(7) That of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records.

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is “noncompensated” even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing duties of his or her office.

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

(10) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(11) Except as provided in subdivision (b), that of an officer or employee of or a person having less than a 10-percent ownership interest in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor, or creditor.

(12) That of (A) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, which corporation enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are found by the public agency, prior to entering into the agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes and (B) any officer, director, or employee acting pursuant to the agreement on behalf of the nonprofit corporation. For purposes of this paragraph, “agreement” includes contracts and grants, and “park,” “natural lands,” and “historical resources” shall have the meanings set forth in subdivisions (d), (g), and (i) of Section 5902 of the Public Resources Code. Services to be provided to the public agency may include those studies and related services, acquisitions of property and property interests, and any activities related to those studies and acquisitions necessary for the conservation, preservation, improvement, or restoration of park and natural lands or historical resources.

(b) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor.

§ 1092.

Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member.

§ 1092.5.

Notwithstanding Section 1092, no lease or purchase of, or encumbrance on, real property may be avoided, under the terms of Section 1092, in derogation of the interest of a good faith lessee, purchaser, or encumbrancer where the lessee, purchaser, or encumbrancer paid value and acquired the interest without actual knowledge of a violation of any of the provisions of Section 1090.

§ 1093.

The State Treasurer and Controller, county and city officers, and their deputies and clerks shall not purchase or sell, or in any manner receive for their own or any other person's use or benefit any State, county or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the State, or any county or city thereof. This section does not apply to evidences of indebtedness issued to or held by such an officer, deputy or clerk for services rendered by them, nor to evidences of the funded indebtedness of the State, county, or city.

§ 1094.

Every officer whose duty it is to audit and allow the accounts of other state, county, or city officers shall, before allowing such accounts, require each of such officers to make and file with him an affidavit or certificate under penalty of perjury that he has not violated any of the provisions of this article, and any individual who wilfully makes and subscribes such certificate to an account which he knows to be false as to any material matter shall be guilty of a felony and upon conviction thereof shall be subject to the penalties prescribed for perjury by the Penal Code of this State.

§ 1095.

Officers charged with the disbursement of public moneys shall not pay any warrant or other evidence of indebtedness against the State, county, or city when it has been purchased, sold, received, or transferred contrary to any of the provisions of this article.

§ 1096.

Upon the officer charged with the disbursement of public moneys being informed by affidavit that any officer, whose account is about to be settled, audited, or paid by him, has violated any of the provisions of this article, the disbursing officer shall suspend such settlement or payment, and cause the district attorney to prosecute the officer for such violation. If judgment is rendered for the defendant upon such prosecution, the disbursing officer may proceed to settle, audit, or pay the account as if no affidavit had been filed.

§ 1097.

Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing script, or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of such laws, is punishable by a fine of not more than one

thousand dollars (\$1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

APPENDIX H

Public Contract Code Sections 10365.5, 10410, 10411, 10430

§ 10365.5.

(a) No person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.

(b) Subdivision (a) does not apply to any person, firm, or subsidiary thereof who is awarded a subcontract of a consulting services contract which amounts to no more than 10 percent of the total monetary value of the consulting services contract.

(c) Subdivisions (a) and (b) do not apply to consulting services contracts subject to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

§ 10410.

No officer or employee in the state civil service or other appointed state official shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, or sponsored and funded, by any state agency or department through or by a state contract unless the employment, activity, or enterprise is required as a condition of the officer's or employee's regular state employment. No officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods.

§ 10411.

(a) No retired, dismissed, separated, or formerly employed person of any state agency or department employed under the state civil service or otherwise appointed to serve in state government may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by any state agency or department. The prohibition of this subdivision shall apply to a person only during the two-year period beginning on the date the person left state employment.

(b) For a period of 12 months following the date of his or her retirement, dismissal, or separation from state service, no person employed under state civil service or otherwise appointed to serve in state government may enter into a contract with any state agency, if he or she was employed by that state agency in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement, dismissal, or separation. The prohibition of this subdivision shall not apply to a contract requiring the person's services as an expert witness in a civil case or to a contract for the continuation of an attorney's services on a matter he or she was involved with prior to leaving state service.

§ 10430.

This chapter does not apply to any of the following:

(a) The Regents of the University of California and the Trustees of the California State University, except that Article 9 (commencing with Section 10420) shall apply to the Trustees of the California State University.

(b) (1) Transactions covered under Chapter 3 (commencing with Section 12100), except that Sections 10365.5, 10410, and 10411 shall apply to all transactions under that chapter.

(2) Notwithstanding paragraph (1), Section 10365.5 shall not apply to incidental advice or suggestions made outside of the scope of a consulting services contract.

(c) Except as otherwise provided in this chapter, any entity exempted from Section 10295. However, the Board of Governors of the California Community Colleges shall be governed by this chapter, except as provided in Sections 10295, 10335, and 10389.

(d) Transactions covered under Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

(e) Except as provided for in subdivision (c), members of boards or commissions who receive no payment other than payment for each meeting of the board or commission, payment for preparatory time, and payment for per diem.

(f) The emergency purchase of protective vests for correctional peace officers whose duties require routine contact with state prison inmates. This subdivision shall remain operative only until January 1, 1987.

(g) Spouses of state officers or employees and individuals and entities that employ spouses of state officers and employees, that are vendored to provide services to regional center clients pursuant to Section 4648 of the Welfare and Institutions Code if the vendor of services, in that capacity, does not receive any material financial benefit, distinguishable from the benefit to the public generally, from any governmental decision made by the state officer or employee.

APPENDIX I

Government Code Sections 1125, 1126, 1127, 1128

§ 1125.

“Local agency,” as used in this article, means a county, city, city and county, political subdivision, district, or municipal corporation.

§ 1126.

(a) Except as provided in Sections 1128 and 1129, a local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee

or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed. The officer or employee shall not perform any work, service, or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board, or commission of his or her employing body, unless otherwise approved in the manner prescribed by subdivision (b).

(b) Each appointing power may determine, subject to approval of the local agency, and consistent with the provisions of Section 1128 where applicable, those outside activities which, for employees under its jurisdiction, are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees. An employee's outside employment, activity, or enterprise may be prohibited if it: (1) involves the use for private gain or advantage of his or her local agency time, facilities, equipment and supplies; or the badge, uniform, prestige, or influence of his or her local agency office or employment or, (2) involves receipt or acceptance by the officer or employee of any money or other consideration from anyone other than his or her local agency for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his or her local agency employment or as a part of his or her duties as a local agency officer or employee or, (3) involves the performance of an act in other than his or her capacity as a local agency officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit, or enforcement of any other officer or employee or the agency by which he or she is employed, or (4) involves the time demands as would render performance of his or her duties as a local agency officer or employee less efficient.

(c) The local agency shall adopt rules governing the application of this section. The rules shall include provision for notice to employees of the determination of prohibited activities, of disciplinary action to be taken against employees for engaging in prohibited activities, and for appeal by employees from such a determination and from its application to an employee. Nothing in this section is intended to abridge or otherwise restrict the rights of public employees under Chapter 9.5 (commencing with Section 3201) of Title 1.

(d) The application of this section to determine what outside activities of employees are inconsistent with, incompatible with, or in conflict with their duties as local agency officers or employees may not be used as part of the determination of compensation in a collective bargaining agreement with public employees.

§ 1127.

It is not the intent of this article to prevent the employment by private business of a public employee, such as a peace officer, fireman, forestry service employee, among other public employees, who is off duty to do work related to and compatible with his regular employment, or past employment, provided the person or persons to be employed have the approval of their agency supervisor and are certified as qualified by the appropriate agency.

§ 1128.

Service on an appointed or elected governmental board, commission, committee, or other body by an attorney employed by a local agency in a nonelective position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with, or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office.

APPENDIX J

Government Code Section 19990

§ 19990.

A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

Each appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees. Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

(a) Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.

(b) Using state time, facilities, equipment, or supplies for private gain or advantage.

(c) Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.

(d) Receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.

(e) Performance of an act in other than his or her capacity as a state officer or employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the officer or employee.

(f) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee.

(g) Subject to any other laws, rules, or regulations as pertain thereto, not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

The department shall adopt rules governing the application of this section. The rules shall include provision for notice to employees prior to the determination of proscribed activities and for appeal by employees from such a determination and from its application to an employee. Until the department adopts rules governing the application of this section, as amended in the 1985 -86 Regular Session of the Legislature, existing procedures shall remain in full force and effect.

If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

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